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No. 99-

IN THE
Supreme Court of the United States

RICHARD SULLIVAN,

Petitioner,

v.

RIVER VALLEY SCHOOL DISTRICT,
a Michigan Corporation;
CHARLES O. WILLIAMS, Superintendent,
individually and in his official capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE ADA HAS JURISDICTION OVER THE EMPLOYER WHO FORMS ITS ERRONEOUS BELIEF THAT THE EMPLOYEE IS MENTALLY DISABLED, AND DEMANDS OF THE EMPLOYEE A POST-HIRING PSYCHOLOGICAL EXAMINATION.

2. WHETHER THE SIXTH CIRCUIT COURT OF APPEALS HAS RULED IN A MANNER WHICH IS INCONSISTENT WITH THE THIRD CIRCUIT DECISION OF *TAYLOR V. PATHMARK STORES, INC.*, NO 97-7617, 177 F3D 180 (3RD CIR. 1999) BY CONCLUDING ERRONEOUSLY THAT AN EMPLOYER MAY CREATE AND FOSTER THE PERCEPTION OF MENTAL INSTABILITY BY ORDERING A PSYCHOLOGICAL EXAMINATION WITHOUT VIOLATING THE ADA OR MHCRA

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit Recommended for Full Text Publication Filed 11/29/99 is reprinted in the Appendix herein at 1a. The Judgment of the Court of Appeals for the Sixth Circuit Filed 11/29/99 is reprinted in the Appendix herein at 16a. The Opinion of the District Court Filed 09/08/98 is reprinted in the Appendix herein at 18a. The Order and Judgment of the District Court Filed 09/08/99 is reprinted in the Appendix herein at32a. The Order of the Court of Appeals for the Sixth Circuit Denying Petition for Rehearing En Banc Filed 01/25/2000 is reprinted in the Appendix herein at 34a.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Sixth Circuit Court of Appeal's judgment affirming the Lower Court's granting of defendants' motion for summary judgment against petitioner's ADA claims pursuant to Supreme Court Rules Chapter III §10. Petitioner filed a Request for Rehearing En Banc and Petition for Rehearing, which were denied on January 25, 2000. The jurisdiction to review the judgment of the Sixth Circuit Court of Appeals is pursuant to 28 USC §2101 and Supreme Court Rules Chapter III §10.

STATUTORY AND CONSTITUTIONAL PROVISIONS

42 USC §12101, *et. seq.*, The Americans With Disabilities Act (hereinafter "ADA") and the pendant state claim under the Michigan Handicapper's Civil Rights Act (hereinafter "MHCRA").

STATEMENT OF THE CASE

A. Lower Court Proceedings

Plaintiff-Appellant's (Plaintiff) claim was brought under the American with Disabilities Act (ADA), 42 USC §12101, *et*

seq., Title VII, 42 USC §2000e *et. seq.*, and was based upon a federal question. Jurisdiction within that court was properly based upon statutes 28 USC §1331, §1332, and §1367. Plaintiff alleged that he was discriminated against in his employment as a teacher with Defendants-Appellees River Valley School District and Charles O. Williams, Superintendent of River Valley School District, (Defendants) due to his being regarded as having a disability. (R.1: Complaint; JA pgs. 6-15).

Jurisdiction is properly founded within this Court pursuant to 28 USC §1291 and §1295. On January 30, 1998, Defendants filed a Motion for Summary Judgment. (R.20: Motion for Summary Judgment; JA pgs. 46-140). Plaintiff then timely filed his Opposition to Defendants' Motion for Summary Judgment on March 2, 1998. (R.24: Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment; JA pgs. 143-409). The U.S. District Court for the Western District of Michigan entered a judgment in favor of Defendants' Motion for Summary Judgment on September 8, 1998. (R.33: Order and Judgment; JA pg. 36).

On October 5, 1998, pursuant to FRAP §3(a) and CR §3, Plaintiff timely filed a Notice of Appeal with the U.S. District Court for the Western District of Michigan. (R.34: Notice of Appeal; JA pg. 38).

On October 5, 1998, Appellant filed his Notice of Appeal, appealing the lower court's granting of defendants' motion for summary judgment.

On November 29, 1999, the Court of Appeals issued its published opinion in the above entitled case.

The Court of Appeals affirmed the lower court's granting of defendants' motion for summary judgment.

On December 15, 1999, Appellant filed his Motion for Rehearing.

On January 25, 2000, the Sixth Circuit Court of Appeals entered an Order denying Appellant's Motion for Rehearing.

B. Statement of Facts

The United States District Court for the Western District of Michigan entered an order dismissing Plaintiff's ADA and Michigan Handicappers Act claims on September 8, 1998. (R.33: Order and Judgment; JA pg. 36). Plaintiff seeks relief from this dismissal.

Defendants brought a Motion for Summary Judgment seeking dismissal of Plaintiff's complaint. In his complaint Sullivan alleged that Defendants had illegally discriminated against him in their employment practices by forcing him, under threat of discipline and suspension, to submit to a post-hiring psychological examination due to the fact that he was regarded as having a disability, in violation of the Americans with Disabilities Act, 42 USC §12101 *et. seq.* (R.20: MSJ; JA pgs. 46-140). The lower court reasoned that Plaintiff had not provided sufficient evidence that would allow a jury to infer that he was treated adversely because he was regarded as having a disability. The lower court's order of dismissal should be reversed.

Richard Sullivan has been a teacher in the River Valley School District ("District") since 1977. He is a tenured teacher holding a B.A. and Master degrees. He is certified to teach K-12 physical education, K-8 all regular education subjects and 7-9 math. In his 20 years of service, Mr. Sullivan has taught physical education, math, and study skills classes. (R.24: Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, Ex. 1: Affidavit of Mr. Sullivan; JA pgs. 169-177).

In March 1995, Williams, the Superintendent of River Valley School District, contacted a psychologist, suggesting that Mr. Sullivan was unstable. On March 15, 1995, Williams sent a letter and selectively chosen materials regarding Mr. Sullivan to this psychologist. Williams clearly regarded Mr. Sullivan as mentally unstable. The materials included various writings by Mr. Sullivan as well as letters and documents from third persons. (R.24: Pl. Br. Opp. to MSJ, Ex.8: March 15, 1995 letter to Dr. Onkka from Williams and attachments; JA pgs. 228-280). When Superintendent Williams first contacted the psychologist by telephone, he insinuated that Mr. Sullivan was dangerous, violent, manipulative, and mentally unstable. (R.24: Pl. Br. Opp. to MSJ, Ex.9: TR of Onkka Dep at Tenure Hearing, pp. 59-61; JA 281-283). Despite the fact that this psychologist stated that he "did not believe Mr. Sullivan to be dangerous or violent, given there is no history of violence reported to [him] by letter or phone," Mr. Sullivan was, nevertheless, ordered to undergo a forced psychological examination. Mr. Sullivan objected to this intrusion on the grounds that it would be misused by the School District in violation of his civil rights under the ADA. (R.24: Pl. Br. Opp. to MSJ, Ex.6: April 14, 1995 Onkka Letter; JA pgs. 214-215).

On March 24, 1995, based on the fact that he regarded Mr. Sullivan as having a disability, Williams conveyed certain of his claims to Mr. Sullivan's supervisor and principal, Mr. Degner. Based solely upon these comments, and without ever having observed Mr. Sullivan in the classroom, Mr. Degner included certain negative comments in Mr. Sullivan's evaluation. (R.24: Pl. Br. Opp. to MSJ, Ex.10: Degner Deposition, pp. 24-28,50-54, & 57; JA pgs. 284-290). Before this contact, Mr. Sullivan had never received anything other than satisfactory evaluations. Mr. Sullivan's affidavit of February 27, 1998 declares:

1. At all meetings before the school board, [I] conducted myself in an appropriate, controlled, reasonable, composed and professional manner.

2. . . . had never been disciplined. . .

3 . . . .enjoyed a good reputation as a teacher among my fellow teachers as well as students . . .

4 . . . .never received other than a satisfactory evaluation (the best evaluation which is achievable in the RVSD system) . . .

5. . . .moved for a hearing before the Administrative Law Judge to dismiss the charges against me.

(R.24: Pl. Br. Opp. to MSJ, Ex. 1 pg. 2, 5-6 JA pgs.170,173-174). Although not deserving of a reprimand or disciplinary action of any kind, the knowledge of these efforts helped to further the perception of mental instability, which was being fostered by the Defendants to retaliate against Mr. Sullivan for his voiced resistance and opposition to the unfounded and discriminatory disciplinary process brought against him.

On April 14, 1995, without ever having met or evaluated Mr. Sullivan, the psychologist wrote a letter to Superintendent Williams which purported to give his professional "impressions" of Mr. Sullivan's mental state. (R.24: Pl. Br. Opp. to MSJ, Ex.16: April 14, 1995 letter from Onkka to Williams; JA pgs. 321-322). Williams simply presented Dr. Onkka's letter to the Board members as an "opinion from analysis". (R.24: Pl. Br. Opp. to MSJ, Ex.5: TR at State Tenure Hearing, Vol II, pp. 120-21; JA pgs. 206-207). This letter had erroneous assumptions and unsubstantiated impressions stated in inflammatory language. For example, the writer suggests that Mr. Sullivan's thinking was "grandiose and mildly associationistic" and that Mr. Sullivan had a "possible psychiatric disorder." (R.24: Pl. Br. Opp. to MSJ, Ex.16; JA

pgs. 321-322). Dr. Onkka's letter was used to support Mr. Sullivan's suspension and to continue the course of discrimination and retaliation against him. These actions underscore the fact that Sullivan was regarded as having a disability.

On April 27, 1995, Mr. Sullivan was suspended with pay "pending a decision by the Board of Education upon my [Williams'] recommendation as Superintendent of Schools of the River Valley School District that you be required to have both a physical and mental examination by appropriate specialists to determine whether an involuntary sick leave is warranted in your case." (R.24: Pl. Br. Opp. to MSJ, Ex.17: April 27, 1995 letter from Williams and May 8, 1995 memo to RV Board members JA pgs. 323-326). Williams then scheduled a special Board meeting for May 8, 1995. (R.24: Pl. Br. Opp. to MSJ, Ex.18: May 7, 1995 letter to Zeiger from Sullivan; Ex.19: May 4, 1995 from Williams JA pgs. 327-328). Williams advised Mr. Sullivan that the meeting would be held in closed session "as the Board considered a personnel matter under the Open Meetings Act," even though Mr. Sullivan had expressed his preference for an open meeting, as allowed by the Open Meetings Act. (R.24: Pl. Br. Opp. to MSJ, Ex.18 and 19; JA pgs. 327-328). Mr. Sullivan attended the meeting on May 8, 1995. At the onset of the meeting, Mr. Zeiger announced a change in the agenda to consider a "personnel matter" first. Packets of documents were then distributed to the Board members, while Mr. Zeiger addressed them, saying words to the effect that there would be no discussion nor questions allowed. (R.24: Pl. Br. Opp. to MSJ, Ex.5: TR of Williams Dep., Vol.II: pp.119-21, 131-135; Ex.20: TR of Zeiger Dep., Vol.III: 137-138; Ex.21: TR of Sullivan Dep., Vol VIII: 149-69 JA pgs. 205-212, 330-331 & 333-353). The Board voted to accept the April 27, 1995 recommendation of Superintendent Williams, in which he ordered that Mr. Sullivan

submit to a psychiatric evaluation by one of the Defendants' doctors. Despite inquiries and objections at the meeting, the Defendants refused to answer any questions, discuss the recommendation or its basis, or even to identify the relevant documents. (R.24: Pl. Br. Opp. to MSJ, Ex.1; JA pgs. 169-177).

On June 16, 1995, Williams wrote a letter to Mr. Sullivan demanding a meeting on an alleged "list of incidents." (R.24: Pl. Br. Opp. to MSJ, Ex.23: June 16, 1995 letter from Williams; JA pgs. 368-369). Importantly, none of the "incidents" criticize Plaintiff's ability to teach. Williams did not mail this letter by certified mail until June 19, 1995, more than 10 days after school had let out for the summer. Mr. Sullivan did not receive this letter until June 30, 1995, Superintendent Williams' last day on the job. (R.24: Pl. Br. Opp. to MSJ, Ex.1; JA pgs. 169-177). Also on June 30, 1995, Mr. Sullivan received another letter from Superintendent Williams, informing him that Williams would be proceeding with charges to be filed with the Board of Education pursuant to Michigan Teacher Tenure Act, for Mr. Sullivan's discharge from the River Valley School District. (R.24: Pl. Br. Opp. to Def. Mot. S. J., Ex.24: June 30, 1995 letter from Williams; JA pgs. 370-371). On July 20, 1995, Defendants brought charges against Mr. Sullivan before the Board of Education. Sullivan claims that these actions all grew out of the fact that he was regarded as having a disability and suffered discrimination and retaliation because of it.

While the Defendants claim that legitimate non-discriminatory reasons are behind the efforts to force an illegitimate psychological examination, suspension, and discipline on Mr. Sullivan, these stated reasons are either pretext or are deliberate acts of retaliation against the Plaintiff for his having exercised his right under the law to oppose a forced psychological examination where he was erroneously

labeled as mentally disabled. The efforts by Defendants to label Mr. Sullivan psychologically disabled, along with other acts of discrimination and retaliation, have stigmatized Plaintiff in his professional standing, as a teacher.

Appellant seeks relief from this court through this Writ of Certiorari.

REASON FOR GRANTING THE WRIT

A. The Sixth Circuit Court of Appeals erred when it failed to follow *Taylor v. Pathmark* and adopted a rule of construction in disability perception cases which will allow employers to engage in arbitrary demands for psychological examinations of employees inconsistent with the meaning of the ADA and its mission.

Introduction

The Americans with Disabilities Act was enacted to address discrimination against individuals with a disability, record of disability, or who are regarded as being disabled. 42 USC §12101(b) and §12102. Title I of the ADA specifies employers may not discriminate against any qualified individual with a disability in regard to any term, condition or benefit of employment, including suspension. *Report From the Committee On the Judiciary*, Report 101-485, Part 3, May 15, 1990, pp. 30-31; 42 USC §12112. Notably, the ADA expressly prohibits retaliation and coercion against an individual because the individual has opposed an act or practice made unlawful by the ADA. 42 USC §12203.

"Disability" includes a record of impairment or being regarded as having an impairment. 42 USC §12112. If an individual meets either of these tests, the person is considered to be an individual with a disability under the ADA. The

"regarded as" definition of disability includes persons who have no impairments but nonetheless are treated as having substantially limiting impairments. 29 CFR §1630.2(1); *see also Report from the Committee on Education and Labor*, Report 101-485, Part 2, pp. 53 (May 15, 1990).

The inclusion of persons "regarded as" having a substantially limiting impairment reflects Congressional intent to protect all persons who are subjected to discrimination based on disability, even if they do not have a disability. It also reflects a recognition by Congress that the reactions of others to an impairment or a perceived impairment can be just as disabling as the limitations caused by an actual impairment. *House Judiciary Report*, No. 485 pt.4, 101st Cong., 2d Sess., pp. 30 (1990); *See also School Board of Nassau County v. Arline,* 480 U.S. 273, (1987).

Some common attitudinal barriers include "concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers." *House Judiciary Report*, at 30. Quite often, employers will assume, **without any objective evidence**, that a person's physical or **mental condition** will cause problems in these areas. The ADA is designed to prevent employment discrimination based on mere speculation and unfounded fears about disability.

The "regarded as" part of the definition is directed at the employer rather than at the individual alleging discrimination. The issue is whether the employer treats the individual as having an impairment that substantially limits major life activities, i.e. working. Therefore, "the perception of the covered entity is a key element of this test." *House Judiciary Report*, at 30. Because it is the employer's perception that is at issue, it is not necessary that the individual alleging discrimination actually have a disability or impairment. The

individual falls within this part of the definition if he or she can show that the employer "made an employment decision because of a perception of disability based on 'myth, fear or stereotype'... If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear, or stereotype' can be drawn." 29 CFR §1630.2(1); *House Judiciary Report*, at 30-31. The legislative history to the Act makes clear that the individual does not have to demonstrate that the employer's perception is wrong. *House Judiciary Report, supra.* For example, one perception fostered by Defendants was that Mr. Sullivan was a direct threat. Although the implication serves to further the perception of mental instability, label the Plaintiff, and continue the discrimination, there is no evidence in the record to justify an inference in the Defendants' favor.

Firing an employee (or in this case, attempting to force a psychological examination) on the basis that he poses a "direct threat" to the health or safety of others is an affirmative defense available to an employer. 42 USC §12113. The employer must identify the specific risk. The standard is whether the persons poses a significant risk to the safety of others, not a speculative or remote risk, and that no reasonable accommodation is available. *Report from the Committee on the Judiciary*, Report 101-485, pp. 45-46 (May 15, 1990); *See also CFR §1630.2(r).* Regarding medical examinations, or the affirmative defenses of direct threat or undue hardship, it is not the responsibility of the applicants or employees to prove they pose no risk. *Sanchez v. Lagoudakis,* 486 N.W. 2d 657 (Mich. 1992); *Report from the Committee on the Judiciary, supra* at Report 101-4485, pp. 45-46; *Chalk v. U.S. Dist. Ct. Cent. Dist. of California,* 832 F.2d 1158 (9th Cir. 1987). Defendants' cursory and unsubstantiated claims do not satisfy these statutory tests.

B A Forced Post-Hiring Psychological Examination by the Employer Violates the ADA and the MHCRA in this case because Sullivan was Regarded as Being Mentally Disabled with no Objective evidence to Support the Demand.

Plaintiff is claiming that he is disabled under the Act, because he was "regarded as being disabled." and has presented direct proof of this discriminatory perception which in and of itself is enough to overcome Defendants' motion for summary judgment. Although Superintendent Williams submitted an affidavit contradicting his own prior testimony, this does nothing more than emphasize the factual dispute, and Plaintiff has met his burden. (R.24: Pl. Br. Opp. to Def. Mot. S. J., Ex.25:

In *Merillat v. Michigan State Univ.*, 523 N.W. 2d 802 (Mich. App. 1994), the court held that the employer's perception of an employee as mentally unstable fell within the statutory definition of "handicap". Making unfair connections and unwarranted stereotypes is conduct the ADA was designed to prohibit. The factual dispute over whether Mr. Sullivan was regarded as having a disability cannot be answered by Superintendent Williams now claiming (contrary to previous testimony) that he did not have this perception, when in fact he used this perception to claim that Mr. Sullivan was a direct threat and should be suspended and psychologically examined.

The EEOC has adopted guidelines to assist employers in determining when it is appropriate to make medical and psychological inquiries and to provide limits on the employer's use of these tests. In order for any post-hiring medical examination or inquiry to be legal, the examination must be job-related and justified by business necessity. EEOC *Technical Assistance Manual*, at pp. VI-2.

The EEOC guidelines provide guidance to employers in determining the appropriateness of post-employment psychological or physical examination.

The EEOC limits the employer's inquiries to two:

> 1 Whether this person currently is able to perform this specific job, with or without accommodation...
>
> 2 Whether this person can perform this job without posing a 'direct threat' to the health and safety of the person or others. . . .

Technical Assistance Manual, at VI-9-10. Clearly, the ADA and MHCRA were designed to put limits on the employer's use of the physical or mental test to discriminate. To follow Defendants' arguments would give carte blanche to employers to use the post-hiring examination as an inappropriate tactic to coerce the employee to reveal personal, psychological information, which is specifically prohibited under the Act.

When the employee suffers adverse employment action because he is a supposed "direct threat" to health and safety, the EEOC guidelines state that:

> [a] employer must be prepared to show a significant current risk of substantial harm (not speculative or remote risk); [b] the specific risk must be identified; the risk must be documented by **objective** medical or other factual evidence regarding the particular individual; [and] even if a genuine significant risk of substantial harm exists, [c] the employer must consider whether it can be eliminated or reduced below the level of a "direct threat" by reasonable accommodation.

Technical Assistance Manual, at VI-2-3. None of these requirements were followed by the Defendants.

C. The ADA Does not Shield the Employer from Liability for Discrimination based upon the Erroneous Belief that the Employee is Mentally Disabled.

Discrimination against an individual because that individual has opposed any act or practice made unlawful by the ADA is specifically prohibited. *Doe v. Kohn Nast & Graf PC*, 862 F.Supp. 1310 (E.D. Pa. 1994); *Short v. Parker Hannifin*, 4:94-CV-99 (W.D. Mich. 1995); *Robinson v. Shell Oil*, WL 25831 (4th Cir. 1995). 42 USC §12203. Mr. Sullivan resisted the efforts to label him as mentally unstable. There are many examples which underscore this very troubling stigmatizing effect on an individual who must be forced in the future to declare that he or she was forced to undergo a psychological evaluation. Contrary to the Sixth Circuit reliance on language in the lower court opinion, Mr. Sullivan emphatically denied any wrong doing and sought a dismissal of all charges against him.

The lower court relies on *Cody v. CIGNA Health Care of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998). This reliance is misplaced for two reasons. First, the facts of this case are not applicable to the present case. The plaintiff in that case was reported to have been carrying a weapon and had a history of depression. But on the issue of whether he was regarded as having a disability, the court concluded that merely requesting a psychiatric examination was not sufficient to resolve this issue in the employee's favor. That is unlike the case of Mr. Sullivan, who relies on the testimony of Superintendent Williams, and others as well, who gave *direct evidence* that he was perceived as being unstable before there was a demand made for a psychological examination. As in *Harris v. H & W*

Contracting Co., 102 F.3d 516 (11th Cir. 1996), where the court held that deposition testimony was sufficient on the "regarded as" issue, Mr. Sullivan has provided *direct proof* that the Defendants perceived him as being disabled and mentally unstable. *See also Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995) (which held that the regarded issue turns on the way others treat that person).

The lower court also relies on *Yin v. State of California*, 95 F.3d 864, 868 (9th Cir. 1966) *cert denied*, 117 S.Ct. 955 (1997) to support its conclusion that health problems, when they have a "substantial and injurious impact on employees job performance" can compel a medical exam. However, this case is distinguishable and in fact draws focus to the problem the court had in addressing Mr. Sullivan's claim. In the first place this is a psychological exam, which is highly intrusive and has a component to it that is suggestive of mental disability. In addition, the objective evidence before the decision to compel a psychological exam does not support a business necessity claim, because none of it supports that there were health problems of a "substantial and injurious impact" that in any way impaired his teaching or that established Mr. Sullivan was engaging in bizarre behavior justifying a psychological examination. This court's unfortunate reliance on unjustified inferences drawn by the lower court denies Mr. Sullivan the de novo review to which he is entitled.

Finally, *Taylor v. Pathmark Stores, Inc.*, No. 97-7617, 177 F.3d 180 (3rd Cir. 1999) relied upon by the Sixth Circuit in this case actually supports Sullivan's claim that a jury question has been raised on the "regarded as" issue. In *Taylor*, the Third Circuit held that a reasonableness standard comes into play in facts similar to *Sullivan*. It is the province of the jury to wrestle with the reasonableness of the factual dispute concerning the employer's "expressed misperception" and determine who is

responsible for the misperception. As the Court noted at 177 F.3d at 195:

> If we were to accept Pathmark's [the employer's] argument, a plaintiff's attempts to disabuse an employer's misperceptions about his disability could be used to eviscerate a "regarded as" claim; . . .

The Court further noted that:

> Reasonability is a fact specific test, and, of course, the employee must have reason to know of the basis of the employer's decision before he can unreasonably fail to correct a mistake.

The undisputed facts in this case are that Sullivan went to the Board meeting where the documents, which form the basis for his being suspended, were reviewed and voted upon. He was denied the right to even find out whether the action concerned him much less present evidence.

This Court should chart a course for disability perception cases which will not allow employers to engage in arbitrary investigation and psychological stigmatizing employees for their present as well as future employment

The affidavits and testimony offered in the lower court clearly establish that there were factual disputes over the motives and intent of the Defendants and their claimed reasons for Mr. Sullivan's suspension.

As well, summary judgment should not have been granted to Defendants where Plaintiff was able to establish a prima facie case of discrimination under the ADA and MHCRA through both substantial direct and circumstantial evidence of discrimination based on a perceived disability. Contrary to the lower court's findings, Plaintiff was able to raise genuine issues of fact regarding whether he met his employer's legitimate work

expectations during 1995. Plaintiff's alleged performance problems must also be viewed in the context of a long-term and highly capable teacher whose performance had never been questioned prior to the onset of Defendants' discriminatory actions. In viewing all the discriminatory acts against him, the Court should see that the suspension was pretextual.

Firing an employee (or in this case, attempting to force a psychological examination) on the basis that they pose a "direct threat" to the health or safety of others is an affirmative defense available to an employer. 42 USC §12113. The employer must identify the specific risk. The standard is whether the persons poses a significant risk to the safety of others, not a speculative or remote risk, and that no reasonable accommodation is available. *Report from the Committee on the Judiciary*, Report 101-485, pp. 45-46 (May 15, 1990); *See also CFR §1630.2(r).* Regarding medical examinations, or the affirmative defenses of direct threat or undue hardship, it is not the responsibility of the applicants or employees to prove they pose no risk. *Sanchez v. Lagoudakis,* 486 N.W. 2d 657 (Mich. 1992); *Report from the Committee on the Judiciary, supra* at Report 101-4485, pp. 45-46; *Chalk v. U.S. Dist. Ct. Cent. Dist. of California,* 832 F.2d 1158 (9th Cir. 1987). Defendants' cursory and unsubstantiated claims do not satisfy these statutory tests..[1]

Mr. Sullivan's *prima facie* case for discrimination under the ADA and MHCRA for a "perception" or "regarded as" case and "retaliation" case is set forth in *Watkins v. Shared Hospital Serv. Corp.,* 852 F.Supp. 640 (M.D. Tenn. 1994); *Short, supra;*

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[1] Plaintiff's claims under MHCRA are pendant state claims and the reasoning set forth in this brief also applies to this issue and need not be restated here. The lower court as well acknowledged the similarity of the ADA and the MHCRA and the utility of a combined analysis. (R.32: Opinion, pg. 9, n.2; JA pg. 24).

and Ballinger v. Aratex, WL 121797 (W.D. Mich. 1988). Mr. Sullivan must show the following:

a. He is within the protected group or regarded as same.

b. He is qualified to perform the job with or without accommodation.

c. He suffered adverse employment action giving rise to an inference of discrimination.

As for retaliation, Mr. Sullivan must prove the following:

a. He participated in statutorily protected activity.

b. His employer subjected him to adverse employment action.

c. There is evidence of a causal link between the Plaintiff's participation and the adverse employment action.

D. The Lower Court Erred in Dismissing Plaintiff's Retaliation Claims Where Genuine Issues of Material Fact Exist.

Resisting the highly intrusive psychological examination ordered by the employer in furtherance of the erroneous perception of mental disability is protected by the ADA. It is unlawful to coerce, intimidate or threaten an individual in the exercise of any right granted or protected by the ADA. 42 USC §12203. Retaliation is strictly prohibited, regardless of whether the individual is right or wrong in his assertion of discrimination. Mr. Degner's testimony, along with evidence that the Plaintiff has presented, clearly establishes that Mr. Sullivan was the victim of unlawful discrimination and retaliation in violation of the ADA and MHCRA.

Since Mr. Sullivan had always received satisfactory evaluations, the negative evaluation on the eve of efforts to force the psychological exam without objective evidence or a direct threat is supportive proof that perception of mental instability was driving the process. Mr. Degner admitted that Mr. Sullivan's job performance was satisfactory (R.30: Pl. Supp. Br. Resp. Def. Mot. S. J., Ex.1, pgs. 30-31; JA pg. 426).

The actions of discrimination and retaliation need not be based solely on the disability. Reliance on *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996) to support this claim is misplaced. The *Roush* case is not a perception issue case, but on the definition of disability issue, the court concluded that there was a material fact issue created and found the conclusion of the district court to be erroneous and remanded the case to district court. Relying on 4th and 5th Circuit decisions, the court concludes that the adverse employment decision must be made "solely because of her disability". Mr. Sullivan meets this test, because the decision to force him to submit to a mental examination was because of the perceived disability being purveyed by Superintendent Williams and widely accepted. Nevertheless, it is respectfully urged that this court consider this issue in light of *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. Nov. 20, 1996). *McNely* held that the ADA statutory language, ,which prohibits discriminatory conduct "because of" the disability should not be interpreted as "solely because of". The Rehabilitation Act contains the specific phrase "solely by reason of." The ADA does not contain this specific language. Consequently, it is urged upon the court that the plain language of the statute, which does not include the term "solely", or some other restrictive language, should not be narrowly construed. Since Congress chose language in the ADA provision that is broader than the comparable Rehabilitation Act, and the legislative history does not support the importation of the word "solely'

from the Rehabilitation Act into the ADA, it is urged that disability cases can be mixed motive and intent cases. Nevertheless, as the facts are set forth on behalf of Mr. Sullivan, it is clear that a perception of a mentally unstable individual was the reason for Superintendent Williams contacting a psychologist and spreading his perceptions of an individual disabled mentally.

CONCLUSION

It is particularly difficult for a person suffering from perceptions of disability to overcome the prejudice and misperceptions that predictably erupt. What is in the minds of those who, in effect, sit in judgment on the day to day activities of such a person is the conduct the Americans With Disabilities Act was designed to counteract. The employer who was the purveyor of false perceptions of mental instability concerning Mr. Sullivan should not be provided a shield for discrimination and retaliation just because these perceptions are erroneous.

RELIEF REQUESTED

Petitioner respectfully requests this petition be granted and a writ of certiorari issue to review this case and REVERSE the Sixth Circuit and REMAND to the lower court for trial on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD A. SULLIVAN,
Plaintiff-Appellant,

v.

RIVER VALLEY SCHOOL DISTRICT, and CHARLES O. WILLIAMS, Superintendent, individually and in his official capacity,
Defendants-Appellees.

No. 98-2143

Appeal from the United States District Court
for the Western District of Michigan at Kalamazoo.
No. 97-00054—Robert Holmes Bell, District Judge.

Argued: September 21, 1999

Decided and Filed: November 29, 1999

Before: BOGGS and DAUGHTREY, Circuit Judges; and MCKINLEY, District Judge.

The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

COUNSEL

ARGUED: Robert A. Yingst, BOOTHBY & YINGST, Berrien Springs, Michigan, for Appellant. C. George Johnson, THRUN, MAATSCH & NORDBERG, Lansing, Michigan, for Appellees. **ON BRIEF:** Robert A. Yingst, BOOTHBY & YINGST, Berrien Springs, Michigan, for Appellant. C. George Johnson, Timothy R. Winship, THRUN, MAATSCH & NORDBERG, Lansing, Michigan, for Appellees.

OPINION

BOGGS, Circuit Judge. Richard Sullivan appeals the district court's grant of summary judgment to Defendants on his claims of discrimination and retaliation, in violation of the Americans with Disabilities Act and the Michigan Handicappers Civil Rights Act. Sullivan argues that his employer, the River Valley School District, and its then-Superintendent, Charles Williams,[1] regarded him as disabled and illegally suspended him without pay for refusing to submit to mental and physical fitness-for-duty examinations ordered by the school board. The district court held that Sullivan failed to provide evidence sufficient for a jury to infer that he received adverse treatment due to being regarded as disabled. Because we agree that an employer's ordering an

[1] Individual supervisors who do not independently qualify under the statutory definition of employers may not be held personally liable in ADA cases. Thus, as the district court held, the claims against Superintendent Williams in his individual capacity should be dismissed. *See Wathen v. General Electric*, 115 F.3d 400, 404-05 n. 6 (6th Cir. 1997) (holding that an individual supervisor may not be held personally liable under Title VII and noting that the Title VII and ADA liability schemes are similar in this regard).

employee to undergo mental and physical examinations does not suffice to show that an employer regards an employee as disabled, we affirm the district court's grant of summary judgment to Defendants.

I

Sullivan has been a teacher in the River Valley School District since 1977. He has tenure. Prior to 1995, he had not been reprimanded or disciplined and had received consistently satisfactory job evaluations. Even considering the facts in the light most favorable to Sullivan, his behavior apparently changed for the stranger beginning in 1995. At a January 23 meeting of the school board that considered grievances he had filed, Sullivan allegedly engaged in disruptive and abusive verbal outbursts, shoved papers in the faces of individual members of the board, and refused to stop when asked by the board president. Around February 6, Sullivan disclosed confidential information about one of his student's grades and a related grade change hearing to a local newspaper. In a February 7 letter to the student government president, Sullivan criticized a decision of the group's faculty sponsor in language deemed inappropriate by the district. Sullivan then failed to report for a March 6 meeting with Superintendent Williams to discuss these incidents.

In a March 15 letter, Superintendent Williams contacted psychologist Timothy Onkka for an informal review of Sullivan's behavior. The Defendants say that because of the odd behavior exhibited by Sullivan, Dr. Williams wanted input from an objective observer as to Sullivan's fitness as a teacher and whether Sullivan needed professional attention. Williams sent Dr. Onkka selected materials including letters and grievances from Sullivan and letters from others about Sullivan for Onkka's examination. According to Dr. Onkka, Williams told him he thought Sullivan might be dangerous and mentally unstable. Dr. Onkka reported back to Williams on April 14 that he did not think Sullivan dangerous, but did think the materials he reviewed suggested Sullivan had a

possible psychiatric disorder for which a more formal psychological assessment should be considered. Williams allegedly presented the letter to the school board without explaining the limited nature of Dr. Onkka's review. Williams suspended Sullivan with pay on April 27, 1995 pending board action on Williams's recommendation that Sullivan be required to undergo mental and physical fitness-for-duty exams.

On March 24, 1995, Williams made derogatory remarks about Sullivan to Principal Degner. Degner then included negative comments in Sullivan's job evaluation without observing Sullivan in the classroom. Sullivan argues that the negative evaluation was retaliation intended to further the perception of him as disabled due to mental instability. Degner concedes that the comments were inappropriate according to the terms of the employment contract and the policies of the district, because Sullivan was neither confronted with them nor given an opportunity to respond to them and because the comments were not withheld from the evaluation until an investigation was completed and disciplinary action taken.

Sullivan supposedly then threatened school board members at an April 24 meeting. After an unfavorable hearing regarding his payment of union representation fees, he stated to board president Dennis Zeiger, "You'll be sorry for this," and told another board member, "You will regret this." Sullivan failed to comply with the superintendent's April 27 (verbal), and May 4 and May 24 (written) directives to turn over his grade book and lesson plan book to one of his principals. Sullivan also refused to comply with the board's May 8 decision to accept Williams's recommendation that Sullivan be required to undergo mental and physical fitness-for-duty examinations, and he continued to ignore May 23 and May 31 written directives from Williams that he schedule appointments for the exams and inform the superintendent's office of the dates and times. Sullivan claims that the stated reasons for ordering his psychological exam and his

suspension were pretextual and that the exams were ordered as deliberate acts of retaliation by the school district.[2]

Sullivan also purportedly failed to comply with the superintendent's directive that he make arrangements to review tenure charges to be filed against him. On June 19, 1995, Williams sent a letter by certified mail demanding a meeting with Sullivan over the list of incidents mentioned above. Sullivan did not receive this letter until June 30, which was Superintendent Williams's last day on the job, and no meeting ever took place. The incidents were the basis for the tenure charges that the district brought against Sullivan that month. The River Valley School Board determined on July 24, 1995 that the various purported acts of misconduct and insubordination by Sullivan were grounds for discharging him. Sullivan appealed that decision to the Michigan State Tenure Commission, which decided on May 23, 1996 that while his actions did not merit discharge they did merit a three-year unpaid suspension. That suspension has now been completed. The commission also directed Sullivan to undergo mental and physical examinations at the school board's expense. Sullivan's suspension was upheld by the State Court of Appeals, and his outstanding motions for leave

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[2] Citing this pretext as a reason not to trust the school district's doctors, Sullivan gave the school board copies of results from examinations by his own doctors conducted on May 4 and 6 attesting to his fitness for continued employment. But Sullivan may not dictate the terms of his medical examination. The Fourth Circuit has upheld a discharge against an ADA challenge where an employee had his private doctor's release to work but refused to take a functional capacity evaluation required by the employer with another doctor. *See Porter v. United States Alumoweld Co.*, 125 F.3d 243, 245-46 (4th Cir. 1997). Likewise, in a pre-ADA case brought under §1983, the Second Circuit upheld the suspension of a teacher who refused to submit to a return-to-duty physical exam by the school district's male doctor, offering instead to be examined by a female doctor chosen by the superintendent at her own expense. *See Gargiul v. Tompkins*, 790 F.2d 265, 266 (2d Cir. 1986).

to appeal to the Michigan Supreme Court were denied on March 30, 1999 and June 29, 1999.

II

Under the ADA, in the absence of direct evidence of disability discrimination, a plaintiff may seek to establish a prima facie case of discrimination. Once established, a prima facie case shifts the burden to the employer to offer a legitimate, nondiscriminatory reason for its action. If the employer articulates such a reason, the plaintiff must then show that the reason given by the employer is pretextual in order to prevail. 42 U.S.C. §§ 12101 *et seq.*; *See also Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1178, 1184-86 (6th Cir. 1996), *and McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

To establish his prima facie case of discrimination under the ADA, Sullivan must show that he is (1) a disabled person within the meaning of the Act, (2) that he is otherwise qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) that he suffered an adverse employment decision due to his disability. *See McKay v. Toyota Motor Mfg., U.S.A., Inc.*, 110 F.3d 369, 371 (6th Cir. 1997). The Act defines a disabled person as one who (1) has a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (2) has a record of such impairment, or (3) does not have an impairment, but is regarded as having one. *See* 42 U.S.C. §12102(2). The Act defines three ways that someone may be "regarded as" disabled, but since Sullivan stipulates that he has no actual disability of any kind, he could only qualify under the third: having no impairment but being treated by a covered entity as having a substantially limiting impairment. *See* 29 C.F.R. §1630.2(1) (1996). Thus, to make out his prima facie case, Sullivan must show that the River Valley School District treated him as having an impairment that substantially limits one or more of his major life activities, that he is otherwise qualified to teach, and that he

was suspended from teaching because the school district regarded him as disabled.

Sullivan's evidence that his employer treated him as impaired is that his employer asked him to undergo mental and physical examinations to determine his fitness as a teacher following his allegedly exhibiting some unusual behavior. Given that an employer needs to be able to determine the cause of an employee's aberrant behavior, this is not enough to suggest that the employee is regarded as mentally disabled. As the district court ably explained, a defendant employer's perception that health problems are adversely affecting an employee's job performance is not tantamount to regarding that employee as disabled. (Dist. Ct. Op. at 11, *citing Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (holding that an offer of a paid medical leave of absence does not show that an employee was regarded as disabled)). *See also Kvintus v. R.L. Polk & Co.*, 3 F. Supp. 2d 788, 796 (E.D. Mich. 1998) (refusing to infer perception of disability from an employer's offer to plaintiff of a paid medical disability leave and noting that "[t]o hold otherwise would unnecessarily inhibit employers from any inquiry regarding the status of behavior on the part of an employee that an employer may perceive as inappropriate for the employment environment").

As noted by the district court, the Eighth Circuit has held specifically that an employer's awareness of behavior that one might associate with an impairment does not of itself show treatment of an employee as disabled and that requiring an employee to see a psychologist before returning to work does not run afoul of the ADA:

> An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability. A request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired. Employers need to be able to use reasonable means to ascertain the cause of

> troubling behavior without exposing themselves to ADA claims under §§ 12112(a) and 12102(2)(C).

Cody v. CIGNA Healthcare of St. Louis, Inc., 139 F.3d 595, 599 (8th Cir. 1998) (citations omitted).

A request that an employee obtain a medical exam may signal that an employee's job performance is suffering, but that cannot itself prove perception of a disability because it does not prove that the employer perceives the employee to have an impairment that substantially limits one or more of the employee's major life activities. Deteriorating performance may be linked to motivation or other reasons unrelated to disability, and even poor performance may not constitute a disability under the ADA. Under the Act, working qualifies as a "major life activity." 29 C.F.R. §1630.2(i). However, the inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. *See Gilday v. Mecosta County*, 124 F.3d 760, 767 (6th Cir. 1997) (collecting cases). *A fortiori*, a mere deterioration in performance at a single, particular job cannot constitute a disability. Just as requesting a mental evaluation does not indicate that an employer regards an employee as disabled, so too expressing concern over an employee's job performance does not show that an employer regards an employee as having a disability that substantially limits a major life activity. Sullivan simply has not provided evidence sufficient to show that his employer regarded him as disabled.

Sullivan argues that if an employer can order mental and physical examinations in a case such as his, there is no limit to when an employer can require such tests. In particular, Sullivan worries that a decision adverse to him on the "shaky facts" of his case would "suggest[] that the psychological labeling from an 'outside psychologist' . . . can lead to an employer's arbitrary investigation of anyone's psychological history" (Appellant's Brief at 29). Were that true, it would indeed be a cause for concern. However, an employer's

discretion to order employees to undergo examinations is hardly unbounded. Post-hiring demands for examinations can only be made where shown to be "job-related and consistent with business necessity." 42 U.S.C. §12112(d)(4)(A). Thus, for an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can "perform job-related functions." 42 U.S.C. §12112(d)(4)(B).

Hence, according to the interpretation in Equal Employment Opportunity Commission regulations, any examination ordered by the employer must be restricted to discovering whether the employee can continue to fulfill the essential functions of the job. *See* 29 C.F.R. Part 1630, App. § 1630.14(c) (offering interpretive guidance to § 1630.14(c)). While not controlling authority, this administrative interpretation does represent "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). Accordingly, we adopt this qualification for a fitness-for-duty examination, acknowledging it is not an excuse for every wide-ranging assessment of mental or physical debilitation that could conceivably affect the quality of an employee's job performance. While it is true that the ADA limits an employer's ability to request unfounded examinations to prevent "the unwanted exposure of the employee's disability and the stigma it may carry," an employer may order a well-founded examination. *EEOC v. Prevo's Family Market, Inc.*, 135 F.3d 1089, 1094 n. 8 (6th Cir. 1998). As the district court held, health problems that significantly affect an employee's performance of essential job functions justify ordering a physical examination "even if the examination might disclose whether the employee is disabled or the extent of any disability." (Dist. Ct. Op. at 15, *quoting Yin v. State of California*, 95 F.3d 864, 868 (9th Cir.

1996)). The same is true for ordering a mental examination when aberrant behavior similarly affects an employee's job performance.[3]

The examinations ordered for Sullivan by defendants in this case meet this standard. Sullivan's behavior had given the school district reason to seek further information about his fitness for continued employment. Though we need not decide today whether advice from an outside health professional is always necessary, we note that the district's obtaining advice that further examination was needed to determine Sullivan's fitness to work buttresses the district's claim that it had reason to believe Sullivan could not perform some essential aspects of his job. This court has upheld requiring mental and physical exams as a precondition to returning to work. *See Pesterfield v. TVA*, 941 F.2d 437-38 (6th Cir. 1991). We have also upheld a finding of insubordination for refusing to submit to such exams. *See Moore v. Board of Educ. of Johnson City Sch.*, 134 F.3d 781, 783 (6th Cir. 1998). Though we also need not decide today whether the district could require Sullivan to pay for the examinations, we note that the Fourth Circuit has upheld a dismissal where the employee refused to pay for a fitness-for-return-to-duty exam after obtaining a general release to work from his own physician similar to Sullivan's. *See Porter*, 125 F.3d at 245-46. Since Sullivan never submitted to the examinations, he precluded himself from being able to establish a genuine issue of material fact as to whether the exams were related to his job, or were too broad in scope.

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[3]Sullivan implicitly argues for a more stringent standard for mental examinations. Indeed, although also ordered to undergo a physical examination, Sullivan does not complain of being perceived to have a physical disability. But Plaintiff provides no statutory or case law authority for such a distinction. We note that the Eighth Circuit has upheld, in a Rehabilitation Act context, requiring an employee recovering from depression to submit to a psychological exam before returning to work. *See Brumley v. Pena*, 62 F.3d 277, 278-79 (8th Cir. 1995).

Sullivan asks this court to adopt a standard that medical examinations could only be ordered if an employee has requested accommodation or if an employer has objective evidence that the employee poses a direct threat to himself or others. There is no good reason to confine an employer's ability to determine the fitness of employees only to instances where they pose a direct threat. Even in that context, this court has already rejected the objective evidence requirement when it was urged by the dissent in *EEOC v. Prevo's Family Market*. *See Prevo's*, 135 F.3d at 1101-02 (Moore, J., dissenting). The Defendants ask the court to apply the standard for proving pretext set out in *Smith v. Chrysler*, and to uphold an employer's request for a medical examination whenever the employer has an honest belief rooted in particularized facts that an employee may not be able to perform the essential functions of his job. *See Smith v. Chrysler Corp.*, 155 F.3d 799, 805-07 (6th Cir. 1998). The honest belief standard is appropriate in considering pretext where an employer's intention matters, but there is no need to assess an employer's intent in ordering a fitness-for-duty examination. An employee's protection from harmful intent on an employer's part comes from the dual requirements that there be evidence sufficient for a reasonable person to doubt whether an employee is capable of performing the job, and that any examination be limited to determining an employee's ability to perform essential job functions. The first of these requirements may resemble the *Smith* rule, insofar as honest belief requires the employer "to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made." *Smith*, 155 F.3d at 807.

Even were Sullivan to provide evidence that he was regarded as disabled, he would also have to establish that he is otherwise qualified for the job he held. As the district court noted, Sullivan does not dispute the evidence that he threatened members of the school board as alleged. Since "threatening other employees disqualifies one" from a job, Sullivan would not be able to meet this requirement. *Palmer*

v. Circuit Court of Cook County, 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 893 (1998).

The final element of a prima facie case that Sullivan had to prove is that he was suspended from teaching because he was regarded as disabled, in other words that his suspension was due to discrimination. Here again Sullivan relies on his employer's request that he undergo mental and physical examinations for proof. But an examination ordered for valid reasons can neither count as an adverse job action nor prove discrimination. And while the district's subsequent suspending of Sullivan is an adverse job action, it was based on his refusal to undergo the valid examinations, which is not a discriminatory reason.

III

Had Sullivan established a prima facie case, the burden would have shifted to the Defendants to articulate a legitimate, nondiscriminatory reason for the adverse employment action taken. Though Sullivan never forced this burden upon them, it is worth noting that Defendants did offer such a reason. In particular, Defendants argue that they sought Sullivan's discharge because of repeated episodes of insubordination, not limited to his refusal to undergo mental and physical examinations. Sullivan has not established a genuine issue of material fact as to the reasons for his suspension and attempted discharge. The state tenure commission's upholding of Sullivan's suspension strongly suggests that the school district's actions were not wholly baseless, even though the commission did reduce Sullivan's discharge to a three-year suspension without pay.

Once the school district had offered a legitimate, nondiscriminatory reason for its actions, the burden would have shifted back to Sullivan to show that the reason was pretextual and that discrimination against his disability was the real motivation for the district's actions. Sullivan's efforts to show that the explanations for the school district's actions

are pretextual misconceive what counts as pretext. Sullivan argues that the school district mounted a campaign during the 1994-95 school year to get rid of him. To show pretext, he points to evidence such as Principal Degner's including negative remarks in Sullivan's job evaluations without actually observing him in the classroom. But it is not enough to show that the Defendants had motives to get rid of him other than these they profess. Sullivan must show that the school district's purported reasons for acting were a pretext for underlying *discriminatory* reasons. Showing pretext is not the same as showing pretext for discrimination.

Evidence of this misconception regarding pretext crops up in several places in Sullivan's argument to the court. For instance, Plaintiff states that the Defendants' ordering of the exam was merely "a ruse to further discriminatory stereotyping so as to justify an adverse job action" (Appellant's Brief at 19) and that "Defendants' reasons for ordering Mr. Sullivan to seek a psychological evaluation were . . . to create and foster the perception of Mr. Sullivan as being mentally unstable" (Appellant's Brief at 27). These statements suggest that the Plaintiff believes that the Defendants never really thought he was disabled, but fostered that impression to harass him, tarnish his reputation and make it easier to oust him. If this is true, though it may be unprofessional and petty, it would not violate the ADA or the MHCRA.

The ADA simply does not protect an employee from an employer's knowingly false accusation of having a disability. Rather, it protects employees from employers who mistakenly treat them as if they have a disability. An employee's lack of a disability does not shield an employer from liability for discriminatory conduct based on a mistaken but genuine belief that an employee is disabled, but the ADA does not proscribe deliberately fostering a false impression of disability. It only protects an employee who actually has or is actually believed to have a disability. As another court has put it recently: "The ADA prohibits discrimination, not action

taken using discrimination as a pretext." *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 195 n.10 (3d Cir. 1999).

IV

Finally, we come to Sullivan's retaliation claim. The ADA's prohibition on retaliation prevents an employer from "discriminat[ing] against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." 42 U.S.C. §12203(a). To make out a case of retaliation, Sullivan must show: "(1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action." *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997).

From Sullivan's argument, it is not at all clear what the supposed protected activity was. If it was refusing to submit to the mental and physical exams, then the retaliation argument is logically incoherent. Plaintiff would be arguing that Defendants ordered him to undergo mental and physical examinations in retaliation for his refusing to undergo mental and physical examinations. But obviously the Defendants could not have been retaliating for Sullivan's not doing something that they had not yet asked him to do. If the supposed protected activity was something else, Sullivan has not shown how any of his other behavior was a protected means of opposing an act or practice made illegal by the ADA. As the state ALJ found in Sullivan's separate action challenging his discharge: "[I]t was incumbent upon appellant to challenge [the board's] actions through legal recourse, as appellant had done in the past, and not to engage in misconduct and insubordination to enforce his rights." Besides which, as discussed above, Defendants were entitled to order the examinations. For this reason, ordering Sullivan to undergo the examinations was not itself an adverse employment action, and suspending him for refusing to comply was not retaliatory.

V

Plaintiff Sullivan failed to make out a prima facie case of being regarded as disabled and did not rebut Defendants' legitimate, nondiscriminatory reason for pursuing his discharge. Sullivan created no genuine issue of material fact as to the reasons for the actions his employer took against him. Rather than show that the Defendants' stated reasons for seeking his discharge were a pretext for discrimination, Sullivan tried to show that Defendants simply had ulterior reasons for their actions against him. Without a showing that those other reasons were discriminatory, however, Sullivan cannot establish a prima facie case for relief under the ADA or MHCRA. Sullivan likewise failed to make out a prima facie case with regard to his retaliation claims. Hence, the judgment of the district court granting summary judgment to Defendants is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-2143

RICHARD A. SULLIVAN,

Plaintiff-Appellant,

v.

RIVER VALLEY SCHOOL DISTRICT, and
CHARLES O. WILLIAMS, Superintendent,
individually and in his official capacity,

Defendants - Appellees.

Filed: November 29, 1999

Before: BOGGS and DAUGHTREY, Circuit Judges; and
McKINLEY, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Michigan at Kalamazoo.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court granting summary judgment to Defendants is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 4:97-CV-54
HON. ROBERT HOLMES BELL

RICHARD A. SULLIVAN,

Plaintiff,

v.

RIVER VALLEY SCHOOL DISTRICT,
a Michigan corporation; and
CHARLES O. WILLIAMS, Superintendent,
individually and in his official capacity,

Defendants.

Filed: September 8, 1998

OPINION

This is another chapter in a long history of litigation by Plaintiff Richard A. Sullivan against the River Valley School District.[1] In this action, Plaintiff has sued the River Valley

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[1] Plaintiff has filed three suits in the Berrien County Circuit Court that are tangentially related to the issues in this case. In the first action, *Sullivan v. River Valley School District,* No. 181913, Plaintiff claimed that the School Board defamed him after he refused to pay union dues. The Court of Appeals affirmed the Circuit Court's dismissal of the case. The second action, *Sullivan v. Williams and Onkka,* No. 96-1652-NO-T, was filed April 16, 1996, and was dismissed on summary disposition on April 8,

School District and its Superintendent, Charles O. Williams, for violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* and the Michigan Handicappers Civil Rights Act ("MHCRA"), M.C.L.A. § 37.1101 *et seq.* This matter is before the Court of Defendants' motion for summary judgment.

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If Defendants carry their burden of showing there is an absence of evidence to support a claim then Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324-25 (1986).

In determining a motion for summary judgment the court views the evidence in the light most favorable to the opposing party and draws all justifiable inferences in his favor. *Morales v. American Honda Motor Co.*, 71 F.3d 531, 535 (6th Cir. 1995). Nevertheless, the mere existence of a scintilla of evidence in support of Plaintiff's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The proper inquiry is

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1997. Defendants have not disclosed what issues were raised in that suit. That suit is on appeal. In the third action, *Sullivan v. River Valley School District and Williams,* No. 96-4019-NO-H, Plaintiff purportedly asserted claims identical to those asserted in this case, but that case was voluntarily dismissed.

whether the evidence is such that a reasonable jury could return a verdict for Plaintiff. *Id. See generally, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-80 (6th Cir. 1989).

II.

Richard A. Sullivan has been a tenured school teacher with the River Valley School District since 1977. He taught physical education, math and study skills classes. Until 1995 he received satisfactory evaluations and was never reprimanded or disciplined.

Plaintiff's disputes with the School Board began in 1990 when he filed a grievance after an unsuccessful bid for a coaching position. His grievance was denied and he withdrew his membership in the union. For the next couple of years there were disputes over Plaintiff's failure to pay the required union representation fee.

In March 1995 Mr. Degner and Mr. Zech evaluated Sullivan's performance. They gave him unsatisfactory performance ratings in the areas of teacher-staff relationships and adherence to administrative policies. The evaluators commented that they were concerned that Sullivan's ongoing conflicts with the union, administration and staff had isolated him and dominated his focus, "taking energy away from his teaching effectiveness." They further commented that he "must improve human relations skills within the district."

Defendant Williams sent Dr. Onkka, a psychologist, some of Mr. Sullivan's letters, claims and grievances from 1992 through 1995, and requested an informal assessment of Mr. Sullivan's fitness as a teacher. By letter dated April 14, 1995, Dr. Onkka advised that Dr. Williams should consider a more formal assessment of Mr. Sullivan's personality to determine his fitness for his job. Dr. Onkka found that a principal theme emerging from the materials was a pattern of disruptiveness

and manipulativeness. Dr. Onkka did not believe that Mr. Sullivan posed a threat of violence, but given the pattern of suspiciousness and distrust, Mr. Sullivan appeared to be struggling with a possible psychiatric disorder which warranted further investigation.

On April 27, 1995, Dr. Williams notified Mr. Sullivan that he was suspended with pay pending a decision by the Board on Dr. Williams' recommendation that Plaintiff be required to have a physical and mental examination to determine whether an involuntary sick leave was warranted. At a hearing on May 8 the Board voted to accept Dr. Williams' recommendation, and ordered Plaintiff to submit to physical and mental examinations. Plaintiff was present at the meeting with counsel, but no discussion or questions were allowed.

In June 1995 Dr. Williams filed tenure charges against Mr. Sullivan alleging that Mr. Sullivan exercised poor professional judgment and engaged in acts of misconduct and insubordination by: 1) writing a letter to a student that was contemptuous of a faculty sponsor and contained inappropriate, contemptuous and cynical remarks; 2) disclosing confidential student record information, 3) failing to report for meetings with the Superintendent, 4) leaving the school building without authorization; 5) failing to comply with the Superintendent's directives to turn over his grade book and lesson plan book; 6) failing to comply with the Board's directives to have a physical and mental examination; 7) failing to comply with the Superintendent's directive that he make arrangements to review charges; 8) engaging in disruptive and abusive behavior at a meeting of the Board of Education; 9) threatening members of the Board; and 10) refusing to sign his evaluation and individualized development plan.

On July 24, 1995, the School Board determined that Plaintiff's conduct constituted just cause for his discharge from employment.

Plaintiff appealed the Board's decision to the Michigan State Tenure Commission ("STC") contesting the factual basis for the charges and alleging that the Defendants' actions violated the Teachers' Tenure Act, the United States and Michigan Constitutions, the Collective Bargaining Agreement, and the Open Meetings Act.

A hearing was held before the STC. By a decision dated May 23, 1996, the STC declined to discharge Sullivan, but imposed a three-year unpaid suspension against Plaintiff, and required that before returning to teaching in the 1998-99 school year he comply with the Board's directive to undergo physical and mental examinations with the designated doctors at the Board's expense. Plaintiff's appeal of his suspension is pending before the State Court of Appeals.

Plaintiff filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Michigan Department of Civil Rights. On April 3, 1997, the Department of Justice, Civil Rights Division, sent Plaintiff a right to sue letter. Plaintiff timely filed this action against the School District and the former Superintendent alleging disability discrimination and retaliation under the ADA and the MHCRA. Defendants have filed a motion for summary judgment.

III.

Defendants contend that the instant dispute involves issues which should have been presented to and decided by the Michigan State Tenure Commission ("STC"), and that this action must accordingly be dismissed under the doctrine of res judicata.

Agency proceedings can be res judicata in a later judicial proceeding if the parties had a full and fair opportunity to litigate the issue before the agency. *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 480-81 (1982); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966). Res judicata applies when "the issues raised in the subsequent case were either resolved in the prior case or, through the exercise of reasonable diligence, might have been raised and resolved in the prior case." *Perkins v. Regents of Univ. of Michigan*, 934 F. Supp. 857, 862 (E.D. Mich. 1996). The Teachers Tenure Act requires a teacher to file a claim of appeal with the STC no later than 20 days after receipt of the controlling board's decision. M.C.L.A. § 38.104(1), M.S.A. § 15.2004(1). A party seeking to file an employment discrimination claim under the ADA must follow the administrative procedures set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e) ("Title VII"). *See* 42 U.S.C.§ 12117. Title VII requires an aggrieved party to file, within 180 days of the alleged discriminatory practice, a charge with the EEOC and receive a "right to sue" letter before bringing an action against "the respondent named in charge," 42 U.S.C. § 2000e-5. *See Dao v. Auchan Hypermarket*, 96 F.3d 787, 789 (5th Cir. 1996); *Schmitt v. Beverly Health and Rehabilitation Services, Inc.*, 962 F. Supp. 1379, 1383 (D. Kan. 1997); *Ditzel v. University of Medicine and Dentistry of New Jersey*, 962 F. Supp. 595, 602 (D.N.J. 1997).

In light of the exhaustion requirements under the ADA, the Court finds that Plaintiff did not have a full and fair opportunity to litigate the disability discrimination claim before the STC. Accordingly, Plaintiff's action before the STC does not preclude him from filing his ADA action in this Court.

IV.

Defendants argue, in the alternative, that they are entitled to summary judgment because Plaintiff cannot make out a case of disability discrimination.

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). In a case such as this, where the plaintiff has no direct evidence of disability discrimination and the employer disclaims reliance on the plaintiff's disability, the plaintiff may attempt to establish his or her claim indirectly through the burden shifting method borrowed from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), by establishing a prima facie case of discrimination and shifting the burden to the employer to offer a legitimate, nondiscriminatory reason for its action. *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1184-85 (6th Cir. 1996).[2]

To establish a prima facie case of disability discrimination, Plaintiff must show:

> (1) that [he] is a disabled person within the meaning of the Act, (2) that [he] is qualified to perform the essential functions of [his] job with or without reasonable accommodation, and (3) that [he] suffered an adverse employment decision because of [his] disability.

McKay v. Toyota Motor Mfg., U.S.A., Inc., 110 F.3d 369, 371 (6th Cir. 1997).

---

[2] Claims of handicap discrimination under Michigan law essentially track those under federal law. Therefore, this Court's resolution of Plaintiff's claim under the ADA also dispenses with his claim under the Michigan Handicappers' Civil Rights Act. *See Monette*, 90 F.3d at 1178 n.3.

Defendants contend that Plaintiff cannot make out a prima facie case under the ADA because he is not "disabled" within the meaning of the ADA. The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

Plaintiff denies that he is disabled. He contends, however, that he was discriminated against because of a perception that he had a mental impairment. He contends that Dr. Williams created the perception that Plaintiff was unstable by sharing Dr. Onkka's report with the Board.

Defendant Williams denies that he perceived Plaintiff as mentally impaired. Rather, he was concerned that Plaintiff *might* be mentally unstable, and wanted a psychological exam to enable him to determine whether Plaintiff was fit to continue teaching.

In *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876 (6th Cir. 1996), the plaintiff argued that the employer perceived her as disabled. In support of this argument she presented evidence that her employer knew she was having health problems, noted that these health problems were affecting her job performance, and offered her a paid medical leave of absence. The Sixth Circuit rejected Plaintiff's argument: "While the defendant may have perceived that Kocsis' health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable

to care for herself or to perform all of the duties of her job." *Id.* at 885.

In *Cody v. CIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998), the plaintiff argued that she was viewed as disabled because her employer offered her paid medical leave and required that she see a psychologist before returning to work. The Eighth Circuit rejected this argument:

> An employer's request for a mental evaluation is not inappropriate if it is not obvious that an employee suffers from a disability. A request for an evaluation is not equivalent to treatment of the employee as though she were substantially impaired. Employers need to be able to use reasonable means to ascertain the cause of troubling behavior without exposing themselves to ADA claims under §§ 12112(a) and 12102(2) (C).

Id. at 599 (citations omitted). The employer's "mere knowledge of behavior that could be associated with an impairment" does not show that the employer treated the employee as if the employee were disabled. *Id.*

In *Kvintus v. R.L. Polk & Co.*, 3 F. Supp.2d 788 (E.D. Mich. 1998), co-workers described the plaintiff as "disorganized," "delusional" and "confrontational." Her employer contacted an industrial psychologist to ascertain how to deal with him. Defendant ultimately offered plaintiff the opportunity to take a paid leave of absence. The plaintiff's position at the company was eliminated while he was on leave, and he filed an action under the ADA for disability discrimination. The plaintiff argued that her employer's perception of disability should be inferred from its offer to plaintiff of a paid medical disability leave. The district court declined to make that inference. "To hold otherwise would unnecessarily inhibit employers from any inquiry regarding the

status of behavior on the part of an employee that an employer may perceive as inappropriate for the employment environment." *Id.* at 796.

It is clear from the preceding authorities that Defendants' concern for Plaintiff's mental condition and their request for further inquiry into Plaintiff's mental condition, are not a sufficient basis from which to infer that they perceived Plaintiff as disabled. Defendants needed to ascertain the cause of Plaintiff's troubling behavior. Plaintiff has failed to show that he was disabled or perceived as disabled. Plaintiff has accordingly failed to meet his burden of establishing a prima facie case of disability discrimination. On this basis alone, Defendants are entitled to summary judgment.

Even if Plaintiff could establish that Defendants perceived him as having a disability, his ADA claim would nevertheless fail because he cannot show that Defendants' request that he undergo psychological examination was discriminatory.

Once an individual has been hired, the ADA provides as follows:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and extent of the disability, unless such examination is shown to be job-related and consistent with business necessity.

42 U.S.C. § 12112 (d) (4) (A).

In applying this section the court must focus on "the nature of job-relatedness and what constitutes a business necessity." *E.E.O.C. v. Prevo's Family Market, Inc.*, 135 F.3d 1089, 1094 (6th Cir. 1998). "The interpretative guidelines to the ADA explain that the statute was intended to prevent against

'medical tests and inquiries that do not serve a legitimate business purpose.'" *Id.* at 1094 (quoting 29 C.F.R. § 1630.13(b) App. (1996)). One of the reasons Congress placed limits on an employer's ability to require employees to undergo medical examination was "the unwanted exposure of the employee's disability and the stigma it may carry." *Prevo's Market,* 135 F.3d at 1094 n. 8.

Plaintiff contends there was no factual support to justify Defendant's demand for a psychological examination. Plaintiff contends there was no business necessity for a mental examination and that the mental exam was merely an attempt to oust plaintiff due to the administration's animosity toward him.

The Collective Bargaining Agreement ("CBA") between the River Valley School District and the River Valley Education Association specifically provides in Article IX(1)(e) that on recommendation of the Superintendent, the Board may require a teacher to undergo a physical or mental examination at the Board's expense. Plaintiff correctly argues that contract language cannot abrogate rights under the ADA or the MHCRA. *See Adkerson v. MK-Ferguson Co.,* 191 Mich.App. 129, 139, 477 N.W.2d 465 (1991) (although union contract included requirement that employees pass psychological assessment before being granted unescorted access at a nuclear power plant, plaintiff had an independent, nonnegotiable right not to be discriminated against on the basis of handicap), *app. den.,* 441 Mich. 877, 494 N.W.2d 745 (1992). Nevertheless, "when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability." *Yin v. State of California,* 95

F.3d 864, 868 (9th Cir. 1996), *cert. denied,* 117 S. Ct. 955 (1997).

Defendants' determination that Plaintiff should undergo a psychological examination in order to determine whether he was competent to teach was preceded by certain actions by Plaintiff that were of legitimate concern to the Board. The record clearly demonstrates that Defendants had good cause for trying to determine whether Plaintiff was fit to teach. Defendants had a legitimate concern that he was undergoing a breakdown of his interpersonal skills. He had shown poor judgment in his communications with students, he had disclosed confidential student records, he had resisted or ignored numerous legitimate directives of his supervisor, and had threatened Board members. Plaintiff does not dispute these underlying allegations. Moreover, Defendants did not rely upon their perception alone. Prior to requesting the psychological examination they sought outside input from a psychologist who suggested that further examination was in order. Defendants had a right and a duty to look into Plaintiff's ability to do his job.

There is no question of fact that the physical and mental examinations furthered the school's legitimate business purpose and business necessity. Defendants are entitled to summary judgment because Plaintiff has not presented evidence to make out a prima facie case of discrimination under the ADA.

Assuming Plaintiff could make out a prima facie case of discrimination on the basis of a perceived disability, the burden would then shift to Defendants to articulate a legitimate, non-discriminatory reason for the adverse employment action.

Defendants have met their burden of coming forward with evidence of a legitimate, nondiscriminatory reason for their actions. They have shown that Plaintiff was suspended not

because of his "disability," but because of numerous instances of misconduct and insubordination, including his refusal to comply with the legitimate directive of the Board that he undergo an examination to confirm that he was not impaired.

Having a disability, or a perceived disability, does not insulate an individual from adverse employment actions. The conduct/disability distinction was recognized by the Sixth Circuit in *Maddox v. University of Tennessee,* 62 F.3d 843 (6th Cir. 1995). In *Maddox* the plaintiff argued that when the university dismissed him on the basis of conduct allegedly caused by his alcoholism, it was the same as if the university acted on the basis of alcoholism itself. The Sixth Circuit rejected this argument. The court held that it was proper to focus on "the distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability." *Id.* at 847.

An employer "must be permitted to terminate its employees on account of egregious misconduct, irrespective of whether the employee is handicapped." *Little v. F.B.I.,* 1 F.3d 255, 259 (4th Cir. 1993) (quoted in *Maddox,* 62 F.3d at 847). "[I]f an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act." *Palmer v. Circuit Court of Cook County,* 117 F.3d 351, 352 (7th Cir. 1997), *cert. denied,* 118 S. Ct. 893 (1998).[3]

Once Defendants articulate a legitimate, nondiscriminatory reason for the adverse employment action, the burden shifts

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[3] There is undisputed evidence in this case that Plaintiff threatened members of the Board. As noted in *Palmer,* the ADA protects only "qualified" employees, "and threatening other employees disqualifies one." 117 F.3d at 352.

back to Plaintiff to show that the reason given is pretextual. Plaintiff argues that during the 1994-95 school year Defendant Williams began a campaign to oust Plaintiff from the school district. According to Plaintiff, it follows that the reasons given by Defendants for the suspension were pretextual. As noted above, Plaintiff has not come forward with any evidence challenging the allegations contained in Dr. Williams' complaint to the Board. Plaintiff has not shown the existence of a question of fact regarding the reasons for his suspension. Accordingly, for yet another reason, Defendants are entitled to summary judgment.

For all the reasons stated herein, the Court finds that Defendants are entitled to summary judgment on Plaintiff's complaint against them.

An order and judgment consistent with this opinion will be entered.

Date: September 8, 1998

/s/ Robert Holmes Bell

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 4:97-CV-54
HON. ROBERT HOLMES BELL

RICHARD A. SULLIVAN,

Plaintiff,

v.

RIVER VALLEY SCHOOL DISTRICT,
a Michigan corporation; and
CHARLES O. WILLIAMS, Superintendent,
individually and in his official capacity,

Defendants.

Filed: September 8, 1998

ORDER AND JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment (Docket # 20) is **GRANTED.**

IT IS FURTHER ORDERED that **JUDGMENT** is entered in favor of the Defendants and this action is **DISMISSED** in its entirety.

Date: September 8, 1998

/s/ Robert Holmes Bell

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-2143

RICHARD A. SULLIVAN,
Plaintiff-Appellant,
v.
RIVER VALLEY SCHOOL DISTRICT,
Defendants - Appellees.

Filed: January 25, 2000

Before: BOGGS and DAUGHTREY, Circuit Judges; and McKINLEY,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

* Hon. Joseph H. McKinley, Jr., United States District Court for the Western District of Kentucky, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

Supreme Court, U.S.
FILED
MAY 23
CLERK

(2)

No. 99-1706

IN THE

Supreme Court of the United States

RICHARD A. SULLIVAN,

Petitioner,

v.

RIVER VALLEY SCHOOL DISTRICT, a Michigan Public School District; CHARLES O. WILLIAMS, Superintendent, individually and in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has Identified any Compelling Reasons Which Would Justify This Court's Exercise of its Discretion to Grant a Writ of Certiorari?

II. Whether the Sixth Circuit Court of Appeals Correctly Applied Controlling Law to the Undisputed Facts of this Case When it Affirmed the District Court's Dismissal of Petitioner's Age Discrimination and Retaliation Claims on Summary Judgment?

LIST OF PARTIES

Petitioner Richard Sullivan, an individual, is an employee of the River Valley School District. He is currently on leave for reasons unrelated to this case.

Respondent River Valley School District is a public school district located in Three Oaks, Michigan and is a governmental agency. Respondent Charles O. Williams was, at all times material hereto, Superintendent of River Valley School District.

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OPINIONS AND ORDERS BELOW

On November 29, 1999, the United States Court of Appeals for the Sixth Circuit issued its Opinion on the merits of this case. (Petitioner's Appendix (hereinafter "Pet. App.") pp. 1a-15a; see also 197 F.3d 804). Judgment pursuant to this Opinion was entered on that same date. (Pet. App. pp. 16a-17a). On January 25, 2000, the Sixth Circuit denied Petitioner's Petition for Rehearing En Banc. (Pet. App. pp. 34a-35a).

On September 8, 1998, the United States District Court for the Western District of Michigan (Honorable Robert Holmes Bell) issued an Opinion analyzing why summary judgment in Respondents' favor was appropriate. (Pet. App. pp. 18a-31a). Also on September 8, 1998, the District Court issued its Order and Judgment granting summary judgment in Respondents' favor and dismissing Petitioner's action, in its entirety. (Pet. App. pp. 32a-33a).

STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE

1. Petitioner's Complaint alleged that Respondents violated his rights under the Americans with Disabilities Act (hereinafter the "ADA"). 42 U.S.C. § 12101, *et seq*. The following portions of this statute are at issue here:

> A. 42 U.S.C. § 12102(2), which defines "disability" as:
>
> (A) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment.

B. 42 U.S.C. § 12203, which provides that:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

2. Petitioner included similar claims under the Michigan Handicappers' Civil Rights Act (hereinafter "MHCRA") which mirrors the ADA.[1] The pertinent provisions are:

A. M.C.L. 37.1202(1)(b), which provides:

> An employer shall not:
>
> * * *
>
> (b) discharge or otherwise discriminate against an individual with respect, compensation, or the terms, conditions or privileges of employment, because of a disability that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> * * *

---

1. Effective March 12, 1998, the MHCRA's title was changed to the Persons With Disabilities Civil Rights Act ("PWDCRA"). The substantive provisions at issue in this case were not amended. Because prior opinions cite the MHCRA, Respondents will continue to refer to this statute by that name.

B. M.C.L. 37.1602(a), which states:

> A person or two or more persons shall not do the following:
>
> (a) retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

* * *

COUNTER-STATEMENT OF THE CASE

A. Proceedings Below.

Petitioner's Complaint alleged that Respondents violated his statutory rights granted by the ADA and the MHCRA by discriminating against him because he was "regarded as" being disabled. Petitioner also alleged that Respondents retaliated against him in violation of both statutes. Respondents denied all claims.

Respondents' motion for summary judgment was granted on September 8, 1998, and Petitioner's Complaint was dismissed in its entirety. (Pet. App. pp. 18a-33a). The Sixth Circuit Court of Appeals agreed, and affirmed the dismissal on November 29, 1999. Petitioner's motion for rehearing *en banc* was subsequently denied.

B. Prior Litigation Between These Parties.

This is the fourth lawsuit Richard Sullivan has filed against the River Valley School District and/or Superintendent Williams. The first was filed in July 1993 in Berrien County,

Michigan, Circuit Court under the caption of *Sullivan v. River Valley School District, et al*, No. 93-2066-NZ-T. That case arose as a result of Petitioner's refusal to pay certain mandatory union fees. That complaint was dismissed upon summary disposition (aka summary judgment), which the Michigan Court of Appeals affirmed on July 11, 1997.

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied, but the Michigan Supreme Court remanded the case to the Court of Appeals for reconsideration in light of the Sixth Circuit decision of *Chappel v. Montgomery*, 131 F.3d 564 (6th Cir. 1998). On remand, the Michigan Court of Appeals reached the same conclusion and again affirmed the dismissal of the case. Petitioner's second application for leave to appeal to the Michigan Supreme Court was denied, as was his Petition for a Writ of Certiorari to this Court. *See Sullivan v. River Valley School Dist, et al.*, S. Ct. No. 99-463.

The second lawsuit, entitled *Sullivan v. Williams and Onkka*, No. 96-1652-NO-T, was filed on April 16, 1996 in Berrien County Circuit Court and was also dismissed upon summary disposition. The order of dismissal was entered on April 8, 1997. Petitioner did not appeal the dismissal of his claims against Dr. Williams.

On October 16, 1996, Petitioner filed his third Berrien County lawsuit, entitled *Sullivan v. River Valley School District and Williams*, No. 96-4019-NO-H, asserting claims identical to those raised herein, *i.e.* alleged violations of the Americans With Disabilities Act and the MHCRA. Petitioner voluntarily dismissed that action after Respondents filed a motion to consolidate it with the second Berrien County lawsuit, mentioned above.

In addition to the three prior lawsuits, Petitioner has been the subject of the tenure hearings before the Michigan Tenure Commission. River Valley School District filed tenure charges against Petitioner seeking his discharge for misconduct and insubordination. The State Tenure Commission (STC) ordered that Petitioner serve a three-year, unpaid suspension as discipline for his misconduct. The Michigan Court of Appeals affirmed that decision, and the Michigan Supreme Court refused to hear the case.

C. Statement of Facts.

The Sixth Circuit's opinion provides a very detailed summation of the undisputed facts giving rise to this case. Respondents incorporate that statement of facts by reference so as not to belabor this Court with a full restatement of the facts. Instead, Respondents simply will reiterate their concerns about Petitioner's behavior.

The most concise summary why Respondents became concerned about Petitioner's performance is contained in the tenure charges brought against Petitioner. In a letter to the Board of Education recommending discipline, Dr. Williams described the following events, which occurred over a relatively short period of time in 1995:

1. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks.

2. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, on or about

February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of that student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.

3. Richard A. Sullivan engaged in an act of misconduct and insubordination by his failure to report for a meeting with then Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.

4. Richard A. Sullivan engaged in an act of misconduct and insubordination by leaving the school building, River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, scheduled for 2:30 p.m. on that date.

5. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O. Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams, to have a physical and mental examination at the expense of the Board of Education according to Article IX(l)(e) of the collective bargaining agreement between the River Valley School District and the River Valley Education Association 5-CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letters dated May 23, 1995 and May 31, 1995, to make appointments for a physical exam and a psychological exam by a physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. Richard A. Sullivan engaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16, 1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education January 23, 1995, at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual

members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education on April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the President of the Board of Education, Dennis A. Zeiger, "You'll be sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

10. Richard A. Sullivan engaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

(Respondents' Appendix (hereinafter "Res. App.") pp. 1a-6a).

Due to this curious behavior, Dr. Williams sought input from a disinterested psychologist to determine whether Petitioner required any manner of professional assistance. Contrary to Petitioner's statement that Dr. Williams suggested Petitioner was unstable, Dr. Williams merely sent a packet of information to psychologist Timothy Onkka, so he could analyze the situation. Dr. Onkka did not diagnose any particular problem, disability, or condition, but simply gave his impression that Petitioner should undergo a more formal evaluation. Respondents had no preconceived notion, one way or the other, whether Petitioner needed professional help. All they knew was

that Petitioner's behavior had changed and was negatively affecting his teaching performance. As allowed by the collective bargaining agreement, Petitioner was instructed to undergo physical and psychological examinations, but he refused. Petitioner's conduct was considered a flagrant act of insubordination, which contributed to the proposed discipline.

SUMMARY OF THE ARGUMENT

Petitioner has failed to identify any compelling reason justifying a writ of certiorari to the Sixth Circuit. Petitioner did not identify any conflicting circuit court decisions, or a circuit decision which conflicts with that of a state court of last resort. Similarly, Petitioner has not identified any important federal questions resolved by a state court which conflict with any other state court of last resort or a United States Court of Appeal. Accordingly, Petitioner has failed to identify *any* reason why this Court's discretion should be exercised by granting the petition for a writ of certiorari.

Petitioner has also failed to call into question the Sixth Circuit's rationale in affirming summary judgment issued by the United States District Court for the Western District of Michigan. Petitioner failed to make a prima facie case of discrimination or retaliation, under both state and federal law. The Sixth Circuit clearly articulated why dismissal was appropriate when it affirmed the district court's judgment. Because Petitioner failed to demonstrate that Respondents regarded him as having a disability which substantially limited a major life activity, Petitioner failed to make a prima facie case. Petitioner also failed to rebut the legitimate, nondiscriminatory reasons for Respondents' actions. Consequently, the discrimination claims fail. Moreover, Petitioner's suggestion that the Sixth Circuit decision conflicts with *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180

(3d Cir. 1999), is without merit. The decisions are actually harmonious in light of the particular facts presented in each of them. The rules of law are identical and the courts applied them to the facts with which they were presented.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO IDENTIFY A COMPELLING REASON REQUIRING THIS COURT TO EXERCISE ITS DISCRETION BY ISSUING A WRIT OF CERTIORARI.

A. General Considerations Governing Petitions for a Writ of Certiorari.

United States Supreme Court Rule (S. Ct. R.) 10 identifies the criteria justifying a writ of certiorari and begins by explaining that this issue is left to the sound discretion of the court. Only compelling reasons will justify issuance of a writ of certiorari, such as when:

> (a) a United States Court of Appeals has entered the decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals;

> (c) a state court of a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

This same rule goes on to explain that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." However, that is all Petitioner does here.

Petitioner did not specifically identify the subpart of S. Ct. R. 10 which he believes justifies review on certiorari. Petitioner's brief is devoted almost exclusively to the argument that the lower courts either made erroneous factual findings or misapplied properly stated controlling rules of law to the facts of the case. The second of Petitioner's two questions presented for review suggests that the Sixth Circuit's opinion was inconsistent with the Third Circuit's decision of *Taylor v. Pathmark Stores, Inc.*, *supra*, but, as explained in the section which follows, he failed to articulate any substantive difference in rulings between these circuits' rulings.

Moreover, the facts of this case are sufficiently unique that any possible precedential value is extremely remote. The issue presented by Petitioner concerns only himself and has no significance beyond its impact on the immediate parties.

B. There is no Inconsistency Between the Sixth Circuit's Ruling Below and the Third Circuit's Decision of *Taylor v. Pathmark Stores, Inc.*

Despite its prominence in Petitioner's statement of questions presented for review, he devotes barely one page of

his Petition to a discussion of the purported inconsistency between the Sixth Circuit's decision below and *Taylor v. Pathmark Stores, Inc.*, *supra*. Petitioner acknowledges that the Sixth Circuit was aware of, and relied upon, *Taylor v. Pathmark Stores, Inc.* but does not identify how the rule of law articulated by the Sixth Circuit purportedly differs from that espoused in *Taylor*. Instead, Petitioner simply argues that the correct rule of law was misapplied to the facts of this particular case. As stated above, however, that is insufficient to warrant a writ of certiorari.

The *Taylor* decision, while serving as a legal springboard for the Sixth Circuit's decision in this case, is factually distinguishable from the present dispute. In *Taylor*, the employer mistakenly believed that the employee was substantially limited in the major life activity of working and, therefore, was disabled. Based on this mistaken belief, Pathmark Stores terminated Taylor's employment. The employee, however, argued that he was capable of performing the job, which is why the Third Circuit concluded that a jury had to determine whether the mistaken belief was reasonable in light of what had transpired.

Conversely, Respondents here have repeatedly explained that they did not know whether Petitioner was capable of performing the duties of his job. River Valley Schools had no preconceived notion, one way or the other, whether Petitioner had a condition which substantially limited the major life activity of working. All they knew is that Petitioner's behavior was hampering his effectiveness. As a matter of law, Respondents did not "regard" Petitioner to be disabled. The factual dispute requiring jury resolution in *Taylor* is entirely absent here.

As the Sixth Circuit explained below, Petitioner argued that the Respondents attempted to fabricate the perception of a disability to support some manner of discipline. However, the Sixth Circuit also recognized that the ADA is *only* designed to

redress discriminatory employment decisions, not employers' actions based on knowingly false accusations of a disability. Respondents do not concede they did such, but Petitioner's bare assertions take his claims outside the realm of the ADA. Even the *Taylor* court noted that:

> [i]f the contention were that Pathmark used Taylor's disability as a pretext for ridding itself of an employee with seniority under the union collective bargaining agreement, Taylor would not have a successful claim that he was regarded as disabled. The ADA prohibits discrimination, not action taken using discrimination as a pretext.

Taylor v. Pathmark Stores, Inc., 177 F.3d at 195, n.10 (3d Cir. 1999). Consequently, to the extent *Taylor* even applies to this particular case, it supports Respondents' position and is entirely harmonious with the Sixth Circuit's decision below.

It must be remembered that Respondent River Valley School District's adverse employment action was as a result of a multitude of events. Discipline did not follow a single event involving, or action taken by, Petitioner, but it was based in substantial part on Petitioner's failure to comply with a directive to undergo certain evaluations. "If the employer is factually mistaken about the extent of an employee's impairment, and the employee or his agent is responsible for the mistake, the employer is not liable under the ADA." *Taylor*, *supra*, at 193. Here, if Respondent did have a mistaken understanding about Petitioner's ability to perform the duties of his job, it resulted directly and exclusively from Petitioner's refusal to undergo the ordered evaluations. Consequently, Respondents cannot be liable under the ADA.

C. Petitioner Failed to Describe any Inconsistency Between the Sixth Circuit's Decisions and any Other Reported Cases.

Petitioner contends the lower court's reliance on *Cody v. SIGNA Healthcare of St. Louis, Inc.*, 139 F.3d 595 (8th Cir. 1998) and *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1966), *cert den.*, 117 S. Ct. 955 (1997) were misplaced. However, it is Petitioner who is misplaced in making this argument. In *Cody*, the Eighth Circuit restated the rule that general awareness of behavior that one might associate with an impairment does not necessarily mean that how the employee was treated was because he was perceived to be disabled. Similarly, if there are health problems which significantly affect an employee's performance of essential job functions, ordering a physical examination is justified. The Sixth Circuit did not misconstrue or misapply the general, well-accepted rules of law set forth in those cases. Instead, Petitioner is simply arguing that his particular factual situation is different than those presented in those cases. However, that is not a sufficient reason for granting a writ of certiorari. Similarly, Petitioner's suggestion that the EEOC guidelines were not followed is another example of a situation undeserving of Supreme Court review.

As detailed above, the Sixth Circuit's decision herein is harmonious with those of other Circuit Courts of Appeal, including the Third and Eighth Circuits. The decision properly applied established rules of law to the facts of this case, so certiorari is unwarranted.

II. THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER FAILED TO STATE A PRIMA FACIE CASE OF DISCRIMINATION OR RETALIATION AND COULD NOT DEMONSTRATE THAT RESPONDENTS' LEGITIMATE, NONDISCRIMINATORY ACTIONS WERE PRETEXTUAL.

The remainder of the petition for a writ of certiorari contains nothing more than general argument suggesting that established law was not properly applied to the facts of this particular case. Petitioner contends simply that the lower courts reached the wrong conclusions. That, however, is not a proper basis on which to issue a writ of certiorari. Rather than ignoring Petitioner's argument on the merits of this case, Respondents will briefly analyze the pertinent civil rights statutes and explain why the lower courts reached the correct conclusions.

A. General Rules Under the ADA.

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). This means that:

> A person seeking relief under the ADA for termination must establish (1) that [he] is a disabled person within the meaning of the Act, (2) that [he] is qualified to perform the essential functions of [his] job with or without reasonable accommodation, and (3) that [he] suffered an adverse employment decision because of [his] disability.

McKay v. Toyota Motor Co., 110 F.3d 369, 371 (6th Cir. 1997); *citing Monette v. Electronic Data System Co.*, 90 F.3d 1173, 1179 (6th Cir. 1996). Every ADA plaintiff is required to present evidence, either direct or circumstantial, of discrimination. In

cases in which a plaintiff relies upon circumstantial evidence of discrimination, a modified *McDonnell Douglas*[2] burden shifting analysis is utilized. The federal circuits routinely apply this burden shifting framework to ADA claims. *See e.g., Monette v. Electronic Data Systems Corp., supra*; *Price v. S-B Power Tool*, 75 F.3d 362 (8th Cir. 1996); *Daigle v. Liberty Life Ins., Co.*, 70 F.3d 394 (5th Cir. 1995); *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793 (7th Cir. 1995); *Ennis v. National Ass'n of Business & Educ. Radio Inc.*, 53 F.3d 55 (4th Cir. 1995).

B. Petitioner Presented No Evidence that Respondents Perceived Him to be Disabled, as Defined Under the ADA.

Petitioner's first obligation is to present evidence sufficient to state a prima facie case of discrimination. Petitioner must establish the existence of a disability that substantially limits a major life activity. *Monette, supra*, at 1181; *citing Prewitt v. United States Postal Serv.*, 662 F.2d 292, 306-308 (5th Cir. 1981) and *Pushkin v. Regents of the Univ of Colorado*, 658 F.2d 1372 (10th Cir. 1981). The ADA defines a disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Petitioner denies that he has any psychological disorder. In other words, he does not contend

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2. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1980).

that he is "disabled," in the usual sense. Instead, Petitioner's claim is based solely on the belief that Respondents "regarded" him as having some type of impairment and then discriminated against him because of that alleged perception. 42 U.S.C. § 12102(2)(C).

"[A]n employer becomes subject to this prong of the statute only when it inaccurately 'perceives' as disabled, an employee who is *not* substantially impaired, and thereafter negatively stereotypes that employee's abilities to the latter's detriment." (Emphasis in original). *McCollough v. Atlanta Beverage Co.*, 929 F. Supp. 1489, 1498 (N.D. Ga., 1996). This particular provision is designed to protect against erroneous stereotypes that some employers hold regarding certain physical or mental impairments that are not substantially limiting in fact. *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1448-1449 (W.D. Wis. 1996); *quoting Vande Zande v. Wisconsin Dep't of Administration*, 44 F.3d 538, 541 (7th Cir. 1995).

In *Byrne v. Board of Educ*, 979 F.2d 560 (7th Cir. 1992), the court explained that "courts have uniformly held 'that an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job.' " *Byrne*, at 567; *quoting Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). The "regarded as" element of the ADA is the Congressional acknowledgment that "society's accumulated myths and fears about disability and disease are as handicapping as other physical limitations that flow from such impairment." *Schluter*, *supra*, at 1449; *quoting School Bd of Nassau Co., Florida v. Arline*, 480 U.S. 273, 284, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987).

The ADA's focus in this area "is whether the impairment, as *perceived*, would affect the individual's ability to find work

across the spectrum of same or similar jobs." (Emphasis in original). *EEOC v. Chrysler Corp*, 917 F. Supp. 1164, 1168 (E.D. Mich. 1996); citing *Partlow v. Runyon*, 826 F. Supp. 40, 44 (D.N.H. 1993). For Petitioner to make a prima facie showing that Respondents "regarded" him as being disabled, "the employer must perceive an impairment, and the employer must perceive that the impairment substantially limits a major life activity." *Fenton v. Pritchard Corp*, 926 F. Supp. 1437, 1444 (D. Conn. 1996). Simply being aware of an impairment is insufficient to demonstrate that the employer regarded the employee as disabled or contributed to the adverse employment action. *Kelly v. Drexel Univ*, 94 F.3d 102, 109 (3d Cir. 1996); *see also Taylor v. Principal Financial Group, Inc.*, 93 F.2d 155, 164 (5th Cir. 1996). "In order to establish a disability under the 'regarded as' provision, petitioner must show that the perceived impairment is a substantial limitation in a major life activity." *Schluter, supra*, at 1449; *quoting Howard v. Navistar Int'l*, 904 F. Supp. 922, 930 (E.D. Wis. 1995). As part of Petitioner's prima facie case, he must demonstrate that Respondents ". . . regarded him as having an impairment that substantially limited his major life activity of working." *Id.* This, however, he did not do.

The federal regulations promulgated under the ADA provide guidance on what constitutes a substantial limitation of a major life activity.

> "Substantially limits" means a person cannot perform a "major life activity" or is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same activity.

29 C.F.R. § 1630.2(j)(1)(ii). "Major life activities" include:

> . . . functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i).

In order to show that one is substantially limited in the major life activity of working, a plaintiff must prove that he is:

> Significantly restricted in ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i).

To be impaired in the major life activity of working, the Petitioner must be significantly restricted or perceived as such, in the ability to perform a class of jobs or a broad range of jobs in various classes. *McKay, supra*, at p. 373. "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *McKay, supra; citing Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995); *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), *cert den.*, 115 S. Ct. 1095 (1995); *Jasney v. United States Postal Serv, supra*, at 1249 n.3. "The inability to work at the particular job of one's choice is not a substantial limit on working under the [ADA]." *Schluter*, at 1449; *quoting Bern v. Board of Educ.*, 979 F.2d 560, 567 (7th Cir. 1992); and *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986). "The burden is on the plaintiff to establish the existence of an

impairment that substantially limits a major life activity as an element of the plaintiff's prima facie case." *Jasney v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985)[3]. "In order to establish a disability under the 'regarded as' provision, plaintiff must show that the perceived impairment is a substantial limitation on the major life activity." *Schluter*, at 1449; *citing Howard v. Navistar. Int'l*, 904 F. Supp. at 930.

Petitioner argues that Respondents did not give him an opportunity to determine whether particular Board action concerned him. He also argued that Respondents did not establish that he posed any particular risk, for purposes of being evaluated or disciplined. This, however, is not an argument that the lower courts misapplied controlling law. Instead, Petitioner is merely arguing that the controlling law was misapplied to the facts of this case. As previously stated, that does not serve to justify a writ of certiorari. Because Petitioner failed to make a prima facie case, certiorari is unnecessary.

C. Petitioner's Acts of Misconduct were Legitimate, Nondiscriminatory Reasons for Respondents' Employment Decision and, Because Petitioner Failed to Show Those Reasons were Pretextual, Dismissal of His Complaint was Appropriate.

Even if Petitioner could state a prima facie ADA claim, dismissal of his Complaint was still appropriate. Under the *McDonnell Douglas* burden shifting analysis if a plaintiff makes a prima facie case, the burden shifts to the employer to offer a legitimate, nondiscriminatory justification for its action. *Monette, supra*, at 1179. To prevail on his ADA claim, Petitioner

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3. Because the ADA parallels the Rehabilitation Act, courts often apply the rationale from Rehabilitation Act decisions to ADA cases. *See Monette, supra*, p. 1178.

must not only demonstrate a disability and that he was qualified for the job, but he must also show that the adverse employment decision ". . . was made solely because of his disability." *Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996).

1. *Respondents Articulated Legitimate, Non-Discriminatory Reasons for Their Decision.*

As the undisputed evidence makes clear, there were many reasons why Petitioner was required to undergo an evaluation, and many reasons why tenure charges were filed against him. One of the most significant reasons for the charges was Petitioner's refusal to be examined. Respondents' request had nothing to do with any perception they had of Petitioner's physical or mental condition. The proper focus of a "regarded as" ADA claim "is on the impairment's effect on the attitudes of others." *Soileau v. Gilford of Maine*, 928 F. Supp. 37, 51 (D. ME. 1996); *citing Wooten v. Farmland Foods*, *supra*, at 385, and *Bern*, *supra*, at 567. Absolutely nothing has been offered by Petitioner even intimating that Petitioner's behavior affected Dr. Williams' attitude or had any impact on the attitudes of others.

The evidence clearly reflects the existence of legitimate, nondiscriminatory reasons for the employment action taken against Petitioner. The facts also show that Petitioner's discipline had nothing to do with any preconceived notions about his physical or mental condition, but had everything to do with his poor judgment, misconduct and insubordination. The factual basis behind the charges were sufficient to warrant a three-year unpaid suspension. The legitimate reasons are indisputable.

2. *Petitioner Failed to Show Respondents' Reasons were Pretextual.*

Having articulated legitimate, nondiscriminatory reasons for their actions, the burden returns to Petitioner to show that Respondents' proffered reasons were a mere pretext for intentional discrimination. At all times, Petitioner carries the ultimate burden of proving, by a preponderance of the evidence, that the challenged employment decision was motivated by the presence of a disability. *Burdine*, at 253. Having articulated legitimate, nondiscriminatory reasons for their actions, Respondents are *entitled* to summary judgment unless Petitioner could show that the reasons were pretextual.

"An employee can show pretext by offering evidence that the employer's proffered reason had no basis in fact, did not actually motivate its decision, or was never used in the past to discharge an employee." *Smith v. Chrysler Corp*, 155 F.3d 799, 805-806 (6th Cir. 1998); *citing Kocsis v. Multi-Care Management Inc.*, 97 F.3d 876, 883 (6th Cir. 1996). "In challenging an employer's action, an employee 'must demonstrate that the employer's reasons (*each of them*, if the reasons independently caused [the] employer to take the action it did) are not true.' " *Smith, supra*, at 806; *quoting Kariotis v. Navastar Int'l Transportation Corp.*, 131 F.3d 672, 676 (7th Cir. 1997). Nowhere did Petitioner even argue, let alone establish, that Respondents' reasons were pretextual.

Moreover, the Sixth Circuit has recognized that when proper, nondiscriminatory reasons for the employment action are honestly held and reasonably based on particularized facts, the employer's actions are almost presumptively legitimate and non-pretextual. *See Smith, supra*, at pp. 806-807. The facts identified above reveal that there were many rational reasons for Respondents to require an evaluation of Petitioner and to

discipline him when he refused. The courts are not designed to micro-manage or second guess the sound business judgment decisions of an employer. Even if a court might have done something different if faced with the same situation, that does not mean discrimination occurred and does not establish pretext. Petitioner must come forward with actual evidence demonstrating that the reasons are pretextual, rather than mere speculation, conjecture, or guess-work. *See Smith*, *supra*, at p. 806. As Petitioner has not established that Respondents' reasons were pretextual, the Sixth Circuit's affirmance of the District Court's dismissal on summary judgment was appropriate and should be affirmed.

D. Petitioner Failed to Make Out a Prima Facie Case Regarding his Retaliation Claims.

Retaliation claims under the ADA must meet specific requirements of proof. The ADA provides that "no person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge . . . under [the ADA]." (42 U.S.C. § 12203(a)).

> To establish a prima facie case of retaliation, a plaintiff must show: (1) that he engaged in protected activity; (2) that he suffered adverse employment action; and (3) that a causal connection existed between the protected activity and the adverse action. If the plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for the adverse employment action. The plaintiff, of course, bears the ultimate burden of proving that the proper reason for the action was merely a pretext for discrimination.

Penny v. United Parcel Serv, 128 F.3d 408, 417 (6th Cir. 1997); *citing Canitia v. Yellow Freight Systems Inc.*, 903 F.2d 1064, 1066 (6th Cir.), *cert den.*, 498 U.S. 984 (1990).

The absence of a prima facie claim of retaliation is so glaring that it might actually be overlooked. Petitioner has merely described acts which he believes were retaliatory. Stunningly, Petitioner failed to identify any "protected activity" for which Respondents allegedly retaliated. The case law on this issue is clear. Petitioner must first show that he was engaged in a protected activity. Instead of doing this, he simply alleges that he was a good teacher, that he should have been evaluated differently and that he was not given an opportunity to respond to some of the items in his evaluation. Before Petitioner may rely on events as retaliatory, Petitioner must first have been engaged in a protected activity. Because Petitioner's entire brief is silent on what that protected activity was, the retaliation claim was properly dismissed.

Additionally, Petitioner must establish a causal connection between the protected activity and the adverse action. Again, an analysis of this component is completely missing in Petitioner's Brief on Appeal. The obvious reason for its omission is that it cannot be shown. Petitioner has failed to offer any evidence indicating that Respondents' acts were caused by Petitioner's purportedly protected activities. Petitioner's failure to make a prima facie case of retaliation alone justifies affirming the lower court's dismissal of this count.

Although it is unnecessary for this Court to review this point, unless it concludes a prima facie case was made, Respondents have articulated legitimate, nondiscriminatory reasons for their actions. Those are set forth in detail in the Statement of Facts and Argument sections above. Having articulated legitimate, nondiscriminatory reasons for their act,

Petitioner was expected to show that the proffered reasons were a pretext for retaliation, which he failed to do.

The last argument Petitioner makes in support of his petition for a writ of certiorari is that the lower court's reliance on *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996) was misplaced. What makes this curious is that nowhere in the Sixth Circuit decision is the *Roush* case cited, let alone discussed or relied upon. Petitioner's suggestion that the lower court erred in following this case, or that anything in the case deserves establishing disability perception precedent, is plainly unwarranted. The lower court's decision concerning the retaliation counts should stand.

CONCLUSION

Petitioner has failed to present any cogent reason why any issue in this case is worthy of this Court's review. The Sixth Circuit Court of Appeals' Decision is sound, harmonious with decisions of other circuits and states, and correctly applies controlling law to the undisputed facts of this case. Respondents respectfully request that Richard Sullivan's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Lansing, Michigan 48933
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APPENDIX

APPENDIX — LETTER FROM RIVER VALLEY SCHOOL DISTRICT TO DAVID L. PONEGALEK, JR. DATED JULY 20, 1995

July 20, 1995

Mr. David L. Ponegalek, Jr.
Secretary, Board of Education
River Valley School District
15480 Three Oaks Road
Three Oaks, MI 49128

Re: Richard A. Sullivan
Charges Pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102
Proposal and Recommendation for Discharge

Dear Mr. Ponegalek:

We, the undersigned Charging Parties, are submitting this communication pursuant to Article IV, Section 2, of the Michigan Teacher Tenure Act, MCL 38.102, to file charges against Richard A. Sullivan, a tenured classroom teacher, currently employed with the River Valley School District. We are proposing and recommending that Richard A. Sullivan be discharged from his employment with the River Valley School District as the proposed outcome and disposition of this matter, because of his misconduct and acts of insubordination during the 1994-95 school year, as hereinafter specified.

Appendix

We, the undersigned Charging Parties, hereby bring and specify the charges against Richard A. Sullivan as follows:

1. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct by writing and communicating a letter dated February 7, 1995 to a student of the School District, Danny Nizzi, then Student Congress President, containing his complaint about a decision by the faculty sponsor and inappropriate, contemptuous and cynical remarks.

2. Richard A. Sullivan exercised poor professional judgment and engaged in misconduct, on or about February 6, 1995, by disclosing confidential student record information about the grade of one of his students, John Spiekhout, in one of his classes during the 1994-95 school year and the grade change hearing with respect to the grade of that student to the newspaper reporter, Lynn Stevens, who subsequently wrote an article that appeared in the Harbor Country News, a newspaper of local circulation in the River Valley School District, which included that information provided by him.

3. Richard A. Sullivan engaged in an act of misconduct and insubordination by his failure to report for a meeting with then Superintendent Charles O. Williams, scheduled for March 6, 1995 at 2:30 p.m., as directed by the Superintendent in his written communication of March 1, 1995.

Appendix

4. Richard A. Sullivan engaged in an act of misconduct and insubordination by leaving the school building, River Valley High School, without authorization, on March 6, 1995, instead of attending the meeting with then Superintendent Charles O. Williams, scheduled for 2:30 p.m. on that date.

5. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with a verbal directive given to him April 27, 1995, a written directive dated May 4, 1995 and another written directive dated May 24, 1995, all given to him by then Superintendent Charles O. Williams, directing him to provide Principal Degner or Principal Zech, with his grade book and lesson plan book.

6. Richard A. Sullivan engaged in acts of insubordination and misconduct by his failure to comply with the directive of the Board of Education adopted May 8, 1995, pursuant to the recommendation of then Superintendent Charles O. Williams, to have a physical and mental examination at the expense of the Board of Education according to Article IX(1)(e) of the collective bargaining agreement between the River Valley School District and the River Valley Education Association 5-CEA/MEA/NEA, and his failure to comply with written directives given to him by then Superintendent Charles O. Williams by letters dated May 23, 1995 and May 31, 1995, to make appointments for a physical exam and a psychological exam by a

physician and psychiatrist from a list provided to him and notify the Superintendent's office of the dates and times of the appointments.

7. Richard A. Sullivan engaged in an act of insubordination and misconduct by his failure to comply with a directive given to him by then Superintendent Charles O. Williams, by letter dated June 16, 1995, directing him to make arrangements to meet with Superintendent Williams to investigate and review charges with respect to various incidents enumerated in the written directive to him dated June 16, 1995.

8. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education January 23, 1995 at which grievances he had filed were being considered, where he engaged in disruptive and abusive verbal outbursts and intimidating physical actions, including the shoving of papers in the faces of certain individual members of the Board of Education, refusing to comply with directives given to him by the President of the Board of Education, Dennis A. Zeiger, to cease such behavior.

9. Richard A. Sullivan engaged in acts of misconduct and insubordination by his behavior at a meeting of the Board of Education April 24, 1995, where following a hearing regarding his payment of union representation fees, he stated to the President of the Board of Education, Dennis A. Zeiger, "You'll be

sorry for this" and he stated to another member of the Board of Education, Greg Scygiel, standing with the then President of the River Valley Education Association, William Magley, "You will regret this."

10. Richard A. Sullivan engaged in an act of insubordination and misconduct by refusing to sign his evaluation and individualized development plan provided to him by Principal Degner and Principal Zech on March 24, 1995.

Richard A. Sullivan by the actions and conduct as specified in the above charges, has demonstrated that he is not fit for continued employment with the River Valley School District and that he must be discharged as recommended and proposed. His actions and conduct demonstrate a lack of responsible judgement and constitute a breach and violation of the responsibilities of his employment. His actions and conduct have adversely affected the operation and administration of the School District and the administrators, teachers, students and parents involved in these circumstances, which justifies his discharge from employment with the School District.

Wherefore, we, the undersigned Charging Parties, ask, recommend and propose that the Board of Education take the necessary action to proceed upon the charges as filed and effect the proposed outcome of the discharge of Richard A. Sullivan from his employment with the River Valley School District.

Sincerely,

RIVER VALLEY SCHOOL DISTRICT

/s/
Donald D. Larson
Superintendent
Dated: July 19, 1995

/s/
Charles O. Williams
Former Superintendent
Dated: July 19, 1995

/s/
Gustave A. Damaske
Business Manager
Dated: July 19, 1995

DDL/COW/gev

cc: Board of Education Members
C. Mostosky, Union Rep.
R. Jelinek, RVEA President
G. Johnson, Attorney
R. Yingst, Attorney